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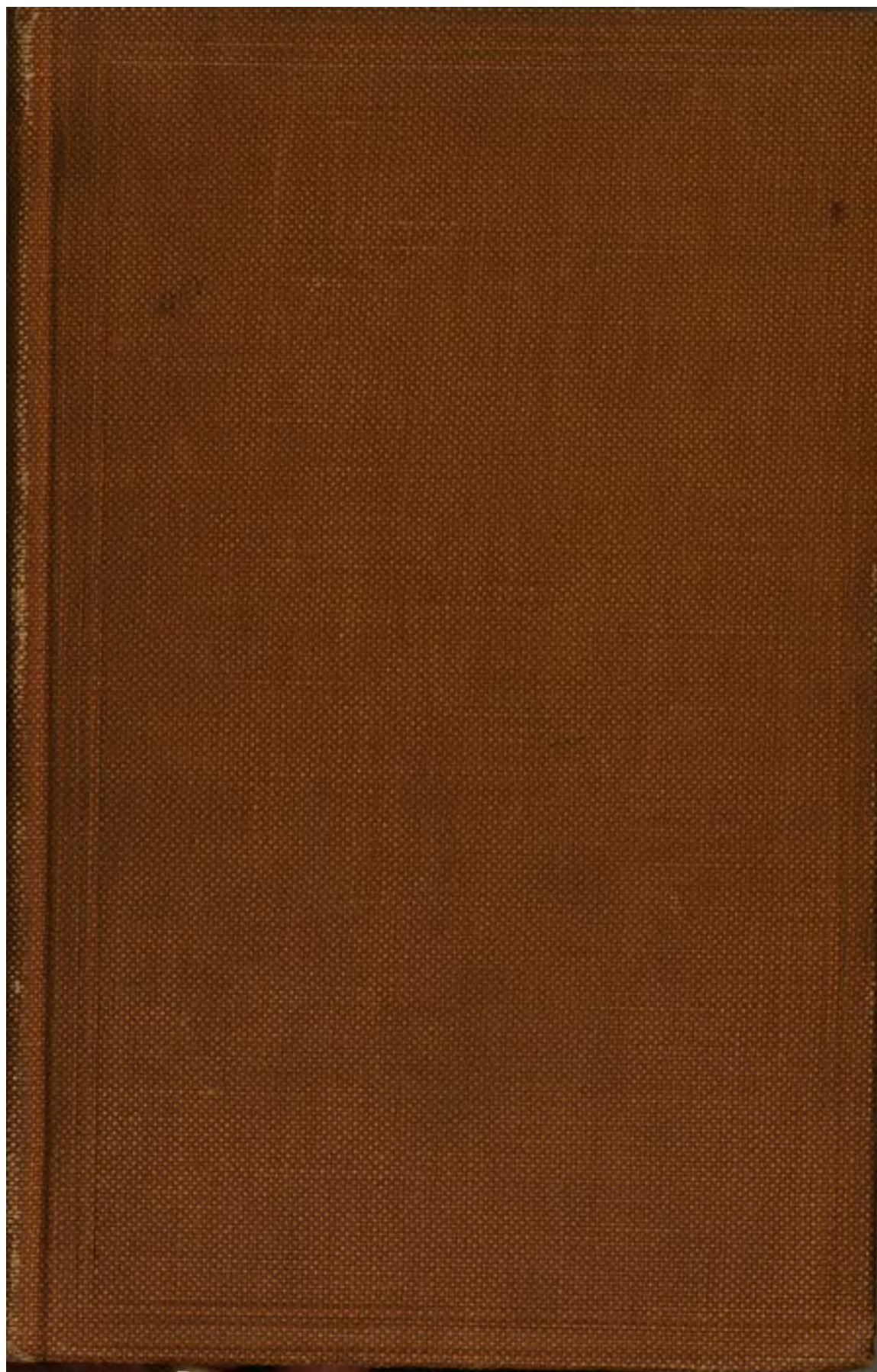
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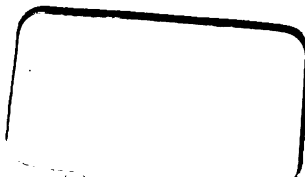
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**L A W**  
**OF THE**  
**DOMESTIC RELATIONS**

**EMBRACING**  
**HUSBAND AND WIFE, PARENT AND CHILD**  
**GUARDIAN AND WARD, INFANCY**  
**AND MASTER AND SERVANT**

**BY**  
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**"WILLS," "EXECUTORS," ETC.**

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## P R E F A C E.

THE main purpose of this volume is to supply students and the professional lawyer alike with an elementary treatise which may serve for study and practical use. It is abridged from the author's larger work upon this subject, and makes use, besides, of the lecture notes used by him for twenty years or more as a Law School professor.

The author himself has wholly prepared the present book. The latest cases have been consulted by him, and the whole work brought fairly down to date, with the citations as full as a volume of the present compass may permit, whose chief object is the elucidation of principles. Reference figures in heavy type are to sections of the original work.

J. S.

JULY 31, 1905.



# CONTENTS.

---

## PART I.

### INTRODUCTORY CHAPTER.

	Page
§§ 1-3. Domestic Relations defined; Scope of Subject; Principles, Ancient and Universal . . . . .	1
4-7. Law of Husband and Wife in Transition State; Common, Civil, and Community Schemes . . . . .	5
8, 9. Recent Marital Legislation in England and America . . .	11
10. The Other Domestic Relations . . . . .	14

---

## PART II.

### HUSBAND AND WIFE.

#### CHAPTER I.

##### MARRIAGE.

§§ 11-14. What Marriage signifies; Contract or Status; Void or Voidable . . . . .	15
15-17. Essentials stated; Disqualifications of Blood or Civil Condition . . . . .	18
18-20. Mental or Physical Incapacity; Effect of Infancy . . .	22
21, 22. Prior Marriage undissolved; Divorce, etc. . . . .	26
23, 24. Force, Fraud, or Error . . . . .	27
25-30. Formal or Informal Marriage Celebration . . . . .	31
31, 32. Consent of Parent or Guardian; Defects under Statute	41
33, 34. Public Policy, Local or International . . . . .	42

## CHAPTER II.

## EFFECT OF MARRIAGE; PERSON OF THE SPOUSE.

	Page
§§ 35, 36. Relation to be discussed; Common-law Coverture . . .	44
37-39. Home; Duty of Cohabitation; Domicile . . . . .	46
40, 41. Contract in Restraint; Alien and Citizen . . . . .	49
42. Wife takes Husband's Surname . . . . .	51
43, 44. Right of Society; Alienation, Enticement, etc. . . .	51
45-48. Services and Support; Chastisement or Restraint . . .	54
49, 50. Regulation of Household; Custody of Children . . .	58
51-54. Mutual Remedies; Crimes; Torts; Contracts . . . .	59
55, 56. Right to Testify; Modern Statutes . . . . .	63

## CHAPTER III.

EFFECT OF COVERTURE UPON WIFE'S DEBTS AND  
CONTRACTS.

§§ 57-60. Wife's Legal Disabilities; Coverture; Exceptions . .	68
61-63. Antenuptial Debts; Disability to Contract . . . . .	70
64-77. Wife binds as Husband's Agent; Wife's Necessaries .	74
78, 79. Wife's General Agency; Marriage of Debtor and Creditor . . . . .	89

## CHAPTER IV.

EFFECT OF COVERTURE UPON WIFE'S INJURIES AND  
FRAUDS.

§§ 80-82 a. Torts committed by Wife; Husband's Joinder . . .	92
83-85. Torts committed upon Wife; Joint Suit, etc. . . . .	95
86. Actual Marriage should appear . . . . .	99

## CHAPTER V.

EFFECT OF COVERTURE UPON THE WIFE'S PERSONAL  
PROPERTY.

§§ 87-89. Husband's Right to Personal Property and Earnings .	100
90-92. Personalty, Corporeal or Incorporeal . . . . .	102
93, 94. Reduction into Possession; Wife's Equity . . . . .	105
95. Wife as Fiduciary . . . . .	107

## CONTENTS.

vii

### CHAPTER VI.

#### EFFECT OF COVERTURE UPON THE WIFE'S CHATTELS REAL AND REAL ESTATE.

		Page
§§ 96, 97.	Wife's Chattels Real, Leases, etc. . . . .	110
98, 99.	Wife's Real Estate; Husband's Usufruct . . . . .	113
100-102.	Conveyance or Lease; Mortgage . . . . .	117
103-105.	His Dissent, Agreement, etc.; Modern Statutes . . . . .	119
106-108.	Wife's Rights protected; General or Separate Real Estate . . . . .	123
109, 110.	Wife's Life Estate; Her Devise . . . . .	126

### CHAPTER VII.

#### COVERTURE MODIFIED BY EQUITY AND RECENT STATUTES.

§§ 111, 112.	Prevalent Tendency to equalize; Modern Legislation	128
113, 114.	Equitable and Statutory Doctrines . . . . .	129

### CHAPTER VIII.

#### THE WIFE'S SEPARATE PROPERTY; ENGLISH DOCTRINE.

§§ 115, 116.	Equitable Rule; Formalities . . . . .	131
117-119.	Coverture preserved; Gift of Produce; Death of Wife	133
120-122.	Miscellaneous Points; Marital Obligations, Restraint of Income, etc. . . . .	135
123.	Recent English Legislation . . . . .	136

### CHAPTER IX.

#### THE WIFE'S SEPARATE PROPERTY; AMERICAN DOCTRINE.

§§ 124, 125.	American Equity Courts; Legislation since 1848 . . . . .	137
126-130.	Legislative Doctrine; Modes of Transfer, etc. . . . .	139
131-134.	Acquisitions from Husband; Incidents . . . . .	144
135-137.	Statute Requirements; Equitable Rules . . . . .	147

### CHAPTER X.

#### THE WIFE'S DOMINION OVER HER EQUITABLE SEPARATE PROPERTY.

§§ 138-141.	Right to enjoy carries Right of Disposal; Exceptions	150
142-144.	How far liable for Wife's Engagements . . . . .	151
145, 146.	Power to appoint; Bestowal upon Husband . . . . .	154
147-149.	Concurrence of Trustee, etc.; Arrears over a Year . . . . .	155



## CHAPTER XI.

THE WIFE'S DOMINION OVER HER STATUTORY SEPARATE  
PROPERTY.

	Page
§§ 150-153. Married Women's Acts considered . . . . .	157
154-156. Debts and their Consideration; Surety, etc. . . . .	159
157-159. Her Personal Liability; Miscellaneous; Husband's Joinder . . . . .	161
160-165. Wife's Land; Husband's Intervention . . . . .	163
166-168. Married Woman as Trustee; Latest State Rules . . .	168

## CHAPTER XII.

THE WIFE'S PIN-MONEY, SEPARATE EARNINGS AND POWER  
TO TRADE.

§§ 169-172. Wife's Pin-Money; Savings; Earnings . . . . .	171
173-176. Her Power to Trade . . . . .	174
177-180. Husband's Liability; Agency and Partnership . . .	178
181. Conclusion as to Married Women's Acts, etc. . . . .	181

## CHAPTER XIII.

## ANTENUPTIAL SETTLEMENTS.

§§ 182-186. Use of Settlements; Statute of Frauds; Considera- tion . . . . .	184
186-189. Form of Settlement; Marriage Articles, etc. . . . .	187
190-192. Lost Instruments, etc.; Secret Settlement . . . . .	189
193-195. Equity Rules; Mistakes corrected; Rescission . . .	191

## CHAPTER XIV.

POSTNUPTIAL SETTLEMENTS; GIFTS AND GENERAL  
TRANSACTIONS BETWEEN SPOUSES.

§§ 196, 197. Settlements Voluntary or upon Consideration . . .	195
198-200. As between Spouses; Gift to Either . . . . .	198
201, 202. Whether Trustee or Conduit needful . . . . .	200
203, 204. Conveyance to Husband and Wife; Resulting Trust	201
205, 206. Statutory Right to Sue; Life Insurance . . . . .	202

## CONTENTS.

ix

### CHAPTER XV.

#### DEATH OF THE WIFE ; RIGHTS AND LIABILITIES OF THE SURVIVING HUSBAND.

	Page
§§ 207, 208. Husband's Right to Administer . . . . .	204
209-211. Inheritance Rights ; Liability for Burial . . . . .	205
212, 213 a. Real Estate Rights ; Curtesy ; Claims . . . . .	207
214. Wills of Married Women . . . . .	209

### CHAPTER XVI.

#### DEATH OF THE HUSBAND ; RIGHTS AND LIABILITIES OF THE SURVIVING WIFE.

§§ 215, 216. Widow's Right to administer ; Distributive Share . .	210
217-219. Waiver of Husband's Will ; Allowance ; Paraphernalia . .	211
220-222. Exoneration of Mortgage ; Claims ; Duty of Burial . .	212
223-225. Wife's Agency Revoked ; Dower and Homestead . .	214
226. Simultaneous Death of Spouses . . . . .	215

### CHAPTER XVII.

#### SEPARATION AND DIVORCE.

§§ 227-229. Separation or Abandonment . . . . .	216
230-232. Divorce Laws and Remedies . . . . .	218
233, 234. Effect of Divorce, Absolute or Qualified . . . . .	222

---

## PART III.

### PARENT AND CHILD.

#### CHAPTER I.

##### OF LEGITIMATE CHILDREN IN GENERAL.

§§ 235-241. Parental Relation ; Legitimacy and Legitimation . .	224
242, 243. Domicile of Children ; Adoption . . . . .	227

#### CHAPTER II.

##### THE DUTIES OF PARENTS.

§§ 244-246. Three Leading Duties ; (1) Protection ; (2) Educa- tion . . . . .	230
247-251. (3) Maintenance ; Common Law and Chancery . .	232
252-254. Child's Necessaries ; Agency ; Trade ; Burial . . .	236

**CHAPTER III.**

**THE RIGHTS OF PARENTS.**

	<b>Page</b>
§§ 255, 256. Three Leading Rights : (1) Chastisement or Correction . . . . .	239
257-263. (2) Custody; Modern Rules; Contracts with Others .	240
264-266 a. (3) Child's Labor and Services . . . . .	245
267, 268. Child's General Property his Own . . . . .	248
269. Legislative Changes in Rights . . . . .	249

**CHAPTER IV.**

**THE PARENT'S RIGHTS AND LIABILITIES FOR THE CHILD'S INJURIES AND FRAUDS.**

§§ 270-272. (1) Child as the Injured Party . . . . .	250
273-276. Parental Action for Enticement, Seduction, etc. . .	252
277. (2) Child as the Injuring Party . . . . .	256

**CHAPTER V.**

**DUTIES AND RIGHTS OF CHILDREN, WITH REFERENCE TO THEIR PARENTS.**

§§ 278. Duties of Children defined . . . . .	258
279-282. Rights of Children; Emancipation and Right to Earnings . . . . .	259
283. Emancipation at Majority; Exceptions . . . . .	263
284, 285. Gifts and Advancements . . . . .	264
286. Quasi-Parental Relation; Step-Children, etc. . . .	268
287, 288. Claims of Child against Parent; Suits . . . . .	269

**CHAPTER VI.**

**ILLEGITIMATE CHILDREN.**

§§ 289-291. Disabilities of Bastards or Illegitimates . . . .	271
292, 293. Mother and Putative Father . . . . .	272
294-296. Abduction; Bequest; Guardianship . . . . .	274

## PART IV.

## GUARDIAN AND WARD

## CHAPTER I.

## OF GUARDIANS IN GENERAL; THE SEVERAL KINDS.

	Page
§§ 297, 298. Relation defined; Various English Classes . . . .	277
299-302. Natural; Socage; Testamentary; Chancery . . . .	278
303. Election by the Infant . . . . .	281
304-308. In America; Chancery and Probate Guardians . . . .	281
309, 310. At Civil Law; Lunatics and Spendthrifts . . . .	284
311, 312. For Special Purposes; Guardian <i>ad litem</i> . . . .	284

## CHAPTER II.

## APPOINTMENT OF GUARDIANS.

§§ 313-317. Authority from Law or Appointment . . . . .	286
318. Chancery and Probate Appointments . . . . .	289
319-325. Jurisdiction; Persons Eligible; Method; Effect . . . .	289
326. Civil Law Methods . . . . .	297

## CHAPTER III.

## TERMINATION OF THE GUARDIAN'S AUTHORITY.

§§ 327, 328. Natural and Casual Termination . . . . .	298
329-331. Death or Marriage of Ward; Death of Guardian . . . .	299
332-335. Resignation or Removal or Supersedure . . . . .	300
336, 337. Marriage of Guardian; Other Cases . . . . .	303

## CHAPTER IV.

## NATURE OF THE GUARDIAN'S OFFICE.

§§ 338, 339. Ward's Person or Estate; Trustee or Attorney . . . .	305
340. Survivorship in Joint Guardianship . . . . .	306
341, 342. Chancery or Probate Control; Trusts Blended . . . .	307
343, 344. Guardian under Age; Quasi Guardianship . . . . .	309
345, 346. Jurisdiction, Local or Foreign; Statutes . . . . .	310

## CHAPTER V.

RIGHTS AND DUTIES OF GUARDIAN CONCERNING THE  
WARD'S PERSON.

	Page
§§ 347-349. Parental Substitute; Custody of Person . . . . .	311
350, 351. Change of Ward's Domicile; no Right to Services . .	313
352-358. Protection, Education, and Maintenance . . . . .	315

## CHAPTER VI.

RIGHTS AND DUTIES OF THE GUARDIAN AS TO THE  
WARD'S ESTATE.

§§ 359, 360. Standard of Diligence; Right to Sue or Defend . .	319
361-364. Guardian's Contracts; Employment; Conversions . .	321
365, 366. Judicial Approval of Conduct; Hazards . . . . .	323
367, 368. Management of Real Estate . . . . .	325
369-373. Management of Personal Property; Investments . . .	327

## CHAPTER VII.

## SALES OF THE WARD'S REAL ESTATE.

§§ 374, 375. Personal and Real Estate Contrasted . . . . .	333
376-380. Sales under Statute; Mortgages; Chancery . . . . .	334

## CHAPTER VIII.

## THE GUARDIAN'S BOND, INVENTORY, AND ACCOUNTS.

§§ 381-385. Chancery or Probate Bonds . . . . .	337
386. Inventory, when required . . . . .	341
387-390. Accounts in Chancery or Probate Practice . . . . .	341
391-393. Compensation; Suit on Bond for Default . . . . .	346

## CHAPTER IX.

## RIGHTS AND LIABILITIES OF THE WARD.

§§ 394, 395. Election by Ward; Suit against Guardian . . . . .	348
396-398. Citation to Account; Suit on Bond; Embezzled Property . . . . .	349
399-402. Fraudulent Transactions set aside; Election . . . . .	350
403, 404. Suspicious Transactions . . . . .	353
405. Marriage of Ward of Chancery . . . . .	355



## PART V.

### INFANCY.

#### CHAPTER I.

##### THE GENERAL DISABILITIES OF INFANTS.

	Page
§§ 406, 407. Period of Majority . . . . .	356
408-411. Office ; Criminal Offences . . . . .	357
412, 413. Right to make Will; to Testify . . . . .	359
414, 415. Marriage Settlement; Execution of Power . . . . .	360

#### CHAPTER II.

##### ACTS VOID AND VOIDABLE.

§§ 416-418. Void, Voidable, and Binding; Privilege of Avoid- ing . . . . .	361
419-422. Void and Voidable Acts Compared . . . . .	364
423, 424. Infant's Trading Contracts; Conclusion . . . . .	366

#### CHAPTER III.

##### ACTS BINDING UPON THE INFANT.

§§ 425-430. Contracts for Necessaries . . . . .	368
431. As to Marriage Relation . . . . .	372
432, 433. Acts not touching Interest; as Shareholder . . . . .	372
434-436. By Compulsion of Law ; Statutory Requirement, etc. . . . .	372

#### CHAPTER IV.

##### THE INJURIES AND FRAUDS OF INFANTS.

§§ 437, 438. Committed by or upon an Infant . . . . .	374
439, 440. Fraudulent Representations Distinguished . . . . .	375
441-443. Suit by Infant or Parent; Contributory Negligence . . . . .	376
444. Compromise or Release of Claim . . . . .	378

## CHAPTER V.

RATIFICATION AND AVOIDANCE OF INFANT'S ACTS  
AND CONTRACTS.

	Page
§§ 445-448. Rule Uncertain ; Statutes Applicable . . . . .	379
449-451. General Principle ; Lands sold or purchased . . . .	380
451, 452. Executory or Continuing Contract, etc. . . . .	384
453, 454. New Promise, or Restoring Consideration . . . .	385
455, 456. Peculiar Cases ; Election by Chancery . . . . .	387

## CHAPTER VI.

## ACTIONS BY AND AGAINST INFANTS.

§§ 457. Suit by Infant ; Next Friend, etc. . . . .	388
458. Actions against Infant ; Guardian <i>ad litem</i> , etc. . . .	389
459. Proceedings in Equity . . . . .	391

## PART VI.

## MASTER AND SERVANT.

## CHAPTER I.

NATURE OF THE RELATION: HOW CREATED AND HOW  
TERMINATED.

§§ 460-464. Relation Defined ; Contract of Hiring . . . . .	392
465, 466. Contract Terminated ; Discharge ; Mutual Assent .	394
467. Servant's Occupation of Premises . . . . .	396

## CHAPTER II.

## MUTUAL OBLIGATIONS OF MASTER AND SERVANT.

§§ 468-473. Obligations upon Master . . . . .	397
474, 475. Servant's Wages or Recompense . . . . .	398
476, 477. Death or Mutual Consent to End . . . . .	400
478. Testimonials of Character . . . . .	402
479, 480. Obligations upon Servant . . . . .	402

CONTENTS.

XV

CHAPTER III.

GENERAL RIGHTS AND LIABILITIES OF THE SERVANT.

	Page
§§ 481, 482. Servants when liable to Third Persons . . . . .	404
483. Servant Criminally Liable . . . . .	405

CHAPTER IV.

GENERAL RIGHTS AND LIABILITIES OF THE MASTER.

§§ 484-486. Right of Action; Enticement, Seduction, etc. . . . .	406
487. Right to Servant's Acquisitions . . . . .	407
488, 489. Liability for Servant's Contracts or Torts . . . . .	407
490. Injury of Servant by Fellow-Servant . . . . .	408
491. Criminal Accountability . . . . .	409

---

INDEX . . . . .	411
-----------------	-----



# TABLE OF CASES.

[REFERENCES ARE TO PARAGRAPH NUMBERS.]

A.			
Abbott v. Abbott	54	Andrews, <i>In re</i>	615
v. Converse	280	<i>Re</i>	349
Abrahams v. Kideely	276	v. Andrews	238
Achilles v. Achilles	192	Andrews's Heirs Case	885
Ackerman, <i>Re</i>	286	Angle v. Hanna	479
Adam's Appeal	317	Ankeny v. Hannon	144, 161
Adams v. Adams	51, 283	Ansley v. Jordan	476
v. Cutright	81	Archer v. Hudson	284
v. Palmer	12	Armitage v. Widoe	422
Agar-Ellis v. Lascelles	246	Armstrong v. Armstrong	88
Ahern v. Easterby	78	v. Ross	166
Airhart v. Murphy	96	v. Walkup	344
Albany Fire Ins. Co. v. Bay	141	Arnold v. Norton	272, 281
Albert v. Perry	322	Arrington v. Dortch	217
Albert's Appeal	335	Arthur v. Arthur	149
Albrecht, <i>Re</i>	132	Ashley v. Martin	372
Aldrich v. Bennett	281	Ashworth v. Outram	175
Aldridge v. Muirhead	164	Atkins v. Sherbino	266
Alexander v. Alexander	94	Atkinson, <i>Ex parte</i>	846
v. Hard	98	v. Medford	18
Allen v. Allen	221	v. Whitehead	865, 369
v. Gaillard	371	Attridge v. Billings	65
v. Hanks	127	Atwood v. Holcomb	265
v. Jackson	83	Austin v. Wilson	82
v. Keilly	464	Avery v. Griffin	62
v. McCullough	95		
v. Poole	447, 449		
v. Scurry	99	B.	
Allen's Appeal	23	Babbitt v. Babbitt	40
Alley v. Winn	74	Babcock v. Doe	419
Almond v. Bonnell	127	Baddeley v. Baddeley	201
Almy v. Wilcox	73	Bahin v. Hughes	82 a
Alston v. Alston	844	Bailey v. Bailey	48
Alsworth v. Cordtz	418, 460	v. King	252 a
Alton v. Mulledy	463	v. Lanahan	465
American Mortgage Co. v. Wright	449	Bain v. Buff	146
Ames v. Ames	371	v. Doran	208
Anderson v. Anderson	92	Bainbridge v. Brown	284
v. Layton	377	Baker v. Baker	266
v. Smith	61	v. Bolton	85
v. Soward	458	v. Braslin	82
v. Watt	39	v. Carter	69
		v. Flournoy	99



## TABLE OF CASES.

[References are to paragraph numbers.]

Baker v. Gregory	165	Beeler v. Young	428
v. Jordan	192	Belford v. Scribner	175
Baldwin v. Carter	187	Bell v. Bumpus	282
v. Foster	248	Bellairs v. Bellairs	32
Ball v. Ball	258, 321	Bellows v. Litchfield	106
v. Bennett	81	Benedict v. Pearce	165
Ballard v. Russell	84	Bennett v. Bennett	44, 269, 285
Baltimore R. v. State	442	v. Ives	482
Bangor v. Readfield	281	v. Mattingly	106
Banker v. Banker	18	v. Morton	474
Banton v. Campbell	203	v. Smith	43
Barbee v. Armstead	43	v. Stacy	474
Barbo v. Rider	310	Benson v. Morgan	172
Barbour v. Barbour	228	Bently v. Terry	263
Barker v. Dayton	73	Benziger v. Miller	265, 282
v. Hibbard	427	Bergen v. Van Liew	226
v. Wilson	420	Berkmeyer v. Kellerman	404
Barlow v. Bishop	173	Berry v. Johnson	323
Barnard v. Ford	94	Besant, <i>Re</i>	227, 246
Barnes v. Barnes	261	Besondy, <i>Re</i>	248, 250, 286
v. Hazleton	285	Bethune v. Green	366
v. Keene	271	Betsinger v. Chapman	30
v. Moore	89, 172	Betton's Trust Estates	97
v. Tote	428	Betts v. Betts	163
v. Trafton	392	v. Carroll	454
v. Wyethe	24	Betzer v. Betzer	44
Barney v. Parsons	365	Beverson's Estate	26
v. Saunders	372	Bevis v. Hedin	366
v. Seeley	368	Bibb v. State	52
Barnum v. Barnum	26	Bicknell v. Bicknell	452
v. Frost	353	Bigaouette v. Paulet	44
Barr v. Armstrong	68	Bigelow v. Grannis	453
v. Van Duyn	475	v. Sickles	56
Barrack v. McCulloch	118	Bingham v. Barley	420
Barrett v. Cocke	368	Birch v. Linton	420
v. Davis	146	Bird v. Randall	479
Bartlett v. Bartlett	146, 209	Bishop v. Blair	109
v. Cowles	330	v. Ranney	479
Bassett v. Bassett	23, 24	v. Shepherd	266
Bast v. Byrne	465	v. Wall	194
Bates v. Enright	73	Bissell v. Bissell	27
Bayler v. Commonwealth	106	Bitner v. Boone	56
Bazeley v. Forder	72, 248	Bixler v. Sellman	286
Beach v. Mullin	461, 465	Blachley v. Labs	283
v. Ranney	83	Black v. Hills	450
Beall v. Beall	241	v. Kaiser	396
Beard v. Dean	823	Blackburn v. Crawfords	237
Beardsley v. Hotchkiss	194, 249, 418	Blaechinska v. Howard Mission	46
Beasley v. State	53	Blagge v. Hsley	274
v. Watson	369	Blair v. Chicago R.	83
Beaver v. Bare	281	Blake v. Pegram	840, 860, 387, 388, 390, 391
Becker v. Gibson	278	Blanchard v. Hsley	275
v. Mason	488	Blodgett v. Brinsmaid	16
Beckham v. Drake	474, 475	Bloodgood v. Meissner	172
Bedell v. Constable	315	Bloomingdale v. Chittenden	132, 419
Bedford v. Bedford	249, 268, 306	Bodine v. Killeen	177, 178
v. Burton	160	Boisseau v. Boisseau	364
Beebe v. Estabrook	285		

## TABLE OF CASES.

xix

[References are to paragraph numbers.]

Boland v. O'Neill	88	Brookfield v. Warren	248
Bold v. Hutchinson	191	Brow v. Brightman	250
Bolinbroke v. Kerr	95	Brown, <i>Re</i>	259
Bolman v. Overall	186	v. Bokes	92
Bond v. Lockwood	367	v. Brown	194, 414
Bonnett v. Bonnett	263	v. Dunham	369
Bonney v. Reardin	431	v. Knapp	283, 285
Booth v. Wilkinson	369	v. Orr	62
Boruff v. Stipp	369	v. Smith	249
Bostwick, <i>Re</i>	251	v. Welsh	286
Botsford v. Wilson	62, 106	v. Wood	55, 56
Bowden v. Gray	89	v. Yaryan	353
Bowe v. Bowe	288	Brown's Appeal	853
Bowers v. Bowers	16	Bruce v. Nicholson	203
Bowles v. Dixon	321	Bruner v. Bruner	45
Bowyer's Appeal	99	Brunnel v. Witherow	185
Boyce v. Boyce	40, 45	Bryan v. Lyon	261
Boyd v. Boyd	285	v. Rooks	211
Boyden v. Boyden	451	Bryant v. Merrill	127
Boyle v. Parker	475, 477	Bryce v. Wynn	328
Bozarth v. Largent	213	Bucher v. Ream	89
Bozeman v. Browning	418	Buck v. Buck	248
Bozzelli, <i>Re</i>	84	v. Gilson	165
Bradbury v. Helms	475	v. Goodrich	98
Bradford v. Bodfish	357	v. Lee	108
v. Greenway	144	Buckingham v. Buckingham	48
Bradley v. Pratt	427	Buckley v. Howard	249
v. Saddler	186	v. Wells	168
Bradshaw v. Beard	210	Bucksport v. Rockland	281
v. Bradshaw	250, 840	Buford v. Speed	78
Brame v. McGee	185	Bugbee v. Blood	70
Branch v. DeBose	401	Bullen, <i>Ex parte</i>	263
Brand v. Abbott	372	Bundy v. Cocke	159
Brantley v. Wolf	450, 454	Burdick v. Babcock	246
Bray v. Wheeler	282	v. Burdick	168
Breadalbane's Case	27	Burge v. Burge	104
Breed v. Judd	452	Burger v. Belsley	84
Breed's Will	357	v. Frakes	348
Brendle v. Herron	420	Burgess v. Carpenter	486
Brent v. Grace	387	Burke v. Louisville R.	267
Brevard v. Jones	129, 214	Burkett v. Trowbridge	77
Brewer v. Hamor	238	Burkholder's Appeal	228
Brewster v. Seeger	362	Burleigh v. Coffin	214
Briaster v. Compton	260, 268	Burnham v. Dalling	403
Brick v. Campbell	132	v. Seaverns	438
Bridgman v. Bridgman	93	Burns v. Kirkpatrick	53
Briggs v. Briggs	51, 287	v. Madigan	252 a
v. Titus	218	v. McGregor	104
Brigham v. Wheeler	307	Burrows v. Bailey	325
Brinkley v. Attorney-General	84	Burson's Appeal	127
Bristol v. Bristol	131, 165	Burt v. Catlin	465
Brittain v. Cannady	395	Burwell v. Burwell	401
Brockbank v. Whitehaven Junction R.	84	Bush v. Bush	261, 366
Broderick v. Broderick	286, 287	v. Linthicum	428, 458
Brooke v. Brooke	30	Bushnell v. Bishop Hill Colony	252 a
Brooker v. Scott	426	Bussom v. Forsyth	238
Brookfield v. Allen	73	Butler v. Butler	192
		Byrnes v. Clark	283

## TABLE OF CASES.

[References are to paragraph numbers.]

C.			
Cadwell v. Sherman	266	Chappell v. Nunn	66
Cahill v. Cahill	106	Chapple v. Cooper	210, 222, 427
v. Lee	108	Charles v. Coker	146
v. Patterson	265	Cheek v. Waldrum	99
Calhoun v. Calhoun	390	Cheely v. Clayton	233
Cammack v. Lewis	221	Cheesman v. Exall	479
Camp, <i>Re</i>	896	Cheever v. Congdon	403
v. Pittman	816	v. Wilson	140, 141
v. Smith	133	Cheney v. Arnold	28
Campbell v. Cooper	265	v. Roodhouse	367, 368
v. Galbreath	88, 201	Cherokee Lodge v. White	127
v. Golden	356	Cheshire v. Barrett	451
v. Gullatt	26	Cheuvete v. Mason	163
v. Mackay	246	Chicago Mutual Association v.	
v. Potter	283	Hunt	433
Campion v. Colton	214	Chicago R. v. Robinson	442
Candy v. Coppock	63	Childress v. Cutter	7
Caney v. Patton	74	v. Mann	73
Cantine v. Phillips	77	Choen v. Porter	82 a
Capps v. Hickman	357	Chorpenning's Appeal	365, 401
Carey v. Berkshire R.	84	Chretien v. Husband	37
Carl v. Wonder	81	Chubb v. Bradley	356
Carleton v. Lovejoy	90	Chunet v. Larson	78
Carlisle v. Tuttle	242	City Council v. Van Roven	62
Carney v. Carney	284	City Savings Bank v. Whittle	422
Carpenter v. Carpenter	148, 440	Clark v. Bayer	81
v. Franklin	171, 172	v. Cassidy	22
v. McBride	366	v. Clark	42, 127, 252 a
v. Osborn	227	v. Field	23, 26
Carr v. Carr	261	v. Garfield	371
Carter v. Grimshaw	284	v. Smith	268
v. Lipsey	366	v. Van Court	402, 453
v. Towne	441	v. Whitaker	386
Case v. Colter	204	Clarke v. Burke	68
Casey v. Smith	442	v. Cordis	319
Cassedy v. Casey	401	Clarke's Appeal	98, 110
v. Jackson	95	Clawson v. Clawson	136
Cassin v. Delany	81	Cleghorn v. James	322
Castle v. Wilkinson	104	Clemens v. Brillhart	281
Castlebury v. Maynard	234	Clement, <i>Re</i>	837
Cathing v. State	410	v. Mattison	18
Catlin v. Haddox	448	Clifton v. Goodbun	295
Caughey v. Smith	278	Clodfelter v. Bost	869
Caulk v. Picou	7	Clough v. Bond	209
Central R. v. Brimson	443	Coates v. Gerlach	199, 201
Chadwell v. Wheless	187	Cobb v. Kempton	397
Chamberlain v. Hazelwood	84	Cochran v. Amsden	328
Chamberlin v. Morgan	474	v. McBeath	187, 191
Chambers v. Sallie	188	v. State	273
Chambles v. Vick	362	Cochrane, <i>Re</i>	48
Chandler v. Deaton	277	Cockrell v. Cockrell	833
v. Glover	448	Coe v. Wager	286
v. Morgan	146	Coffin v. Morrill	103
v. Simmons	454	Cole v. Cole	18, 260
Chapman v. Hughes	427	v. Gourlay	879
v. Tibbits	859, 369	v. Seeley	61
		v. Shurtleff	61
		Coleman v. Davies	403

**xxi**

Coles v. Trecothick	182, 191	Craig v. Van Bibber	450, 454
Collins v. Collins	227, 232	Cramer v. Reford	178
v. Hoxie	296	Crane v. Bandoine	283
v. Price	474	v. Brice	90
Coltman v. Hall	348	Credle v. Carrawan	185
Colvin v. State	324	Green v. Wright	466
Commonwealth v. Fletcher	163	Crehore v. Crehore	28
v. Graham	77, 265, 281, 481	Creuze v. Hunter	258
v. Kenney	17	Crockett v. Doriot	144
v. Lynes	413	Croft v. Terrell	334
v. McAfee	47	Crook v. Hill	295
v. Munsey	52	Crosby v. Crosby	342
v. Munson	28, 30	v. Merriam	372
v. Reed	349	Croze v. Rutledge	55
Compton v. White	284	Cross v. Cross	227
Conant v. Souther	353	v. Grant	44
Conboy v. Howe	252	v. Noble	104
Condon v. Hughes	267	Crummey v. Mills	422
Conklin v. Doul	174	Cuckson n. Stones	476
c. Thompson	488	Culp v. Wilson	285
Conlin v. Cantrell	152	Cummings v. Cummings	92, 387
Conn v. Conn	248	v. Everett	452
Connell v. Putnam	271	Cummins v. Cummins	890
Conrad v. Abbott	69	Cunningham v. Barnes	263
v. Shomo	165	v. Reardon	210
Continental Bank v. Strauss	423	Curtis v. Curtis	255
Conway v. Reed	438	v. Hobart	867
Cook v. Cook	22	Curtiss v. McDougal	454
Coolidge v. Parris	82	Cushman v. Hassler	252
Cooper v. Crane	24	Cutter v. Powell	474, 476
v. Macdonald	119	Cutting v. Seabury	273
v. Maddox	207	Cutts v. Cutts	389
Corbet v. Tottenham	301, 336		
Corbitt v. Carroll	396		
Corcoran v. Allen	357		
Corey v. Burton	422, 424, 454		
Corgell v. Dunton	147		
Corn v. Matthews	419	Dain v. Wyckoff	276
Cornelia v. Ellis	66	Dale v. Robinson	144
Corrie v. Corrie	260	Dalrymple v. Dalrymple	23, 26, 28
Cothran v. Lee	66, 69	D'Alton v. D'Alton	261
Cotton v. Wolf	336	Dalton v. Halpin	293
Cottrell's Estate	250	Damon v. Osborn	487
Countess of Portsmouth v. Earl of Portsmouth	23	Danenhoffer v. State	256
Courtright v. Courtright	248, 252 a	Daniel v. Hill	242, 350
Coverdale v. Eastman	189	Danville v. Amos Keag Co.	419
Covington v. Leak	371	Dardier v. Chapman	95
Cowan v. Mann	174	Darling v. Noyes	252 a
Cowan's Appeal	404	Daubenspeck v. Biggs	194
Cowden v. Pitts	108	Daubney v. Hughes	76, 77
v. Wright	272	Davies v. Davies	414
Cowell v. Daggett	268	v. Solomon	88
Cowles v. Cowles	19	v. Williams	274
Cowls v. Cowls	333	Davis v. Carroll	63
Cowton v. Wickersham	105	v. Combs	387
Cozine v. Horne	322	v. Davis	108, 197
Craig v. Craig	195	v. Dudley	420, 448
		v. Goodenow	283
		Davis's Appeal	90, 103, 864

[References are to paragraph numbers.]

Davison v. Atkinson	122	Downin v. Sprecher	379
Dawson v. Helmes	420, 450	Downs v. N. Y. Central R.	442
v. Jay	350	Doyle v. Kelly	62
Day v. Burnham	69	Draper v. Draper	413
v. Messick	61	Dresel v. Jordan	64, 78
v. Oglesby	266	Drew v. Drew	422
Dayton v. Dusenberry	127	Drybutter v. Bartholomews	102
Dean v. Brown	122	Drysdale v. State	44
v. Feeley	400	Dubé v. Beaudry	419, 422
v. Metropolitan R.	202	DuBoulay v. DuBoulay	294
v. Shelly	106	Duffles v. Duffles	44
Deane v. Annis	252 a	Dumain v. Gwynne	283
Deare v. Soutten	66	Duncan v. Crook	309
Debenham v. Mellon	68, 75	v. Duncan	26, 28
De Farges v. Ryland	56	v. Pope	293
De la Montaigne v. Union Ins. Co.	369	Dunham v. Hatcher	315
Delano v. Blanchard	78, 90	Dunn v. Lancaster	221
De Manneville v. De Manneville	258	v. Sargent	93, 127
Demarest v. Wynkoop	146	Dunnahoe v. Williams	78
Deming v. Williams	227	Dunton v. Brown	423, 424, 452
Denison v. Denison	26, 28	Duntze v. Levett	13
Dennis v. Crittenden	55	Durham v. Durham	18
Deshon v. Woods	183	Durrett v. Commonwealth	371
Desnoyer v. Jordan	127	Dutton v. Dutton	227
Desribes v. Wilmer	301, 315	Dyer v. Brannock	26
De Thoren v. Attorney-General	26, 27, 28	Dyer's Case	317
Dexter v. Blanchard	252 a	Dysart Peerage Case	26, 28
Dickerson v. Brown	26		
Dieringer v. Meyer	465		E.
Dierker v. Hess	281, 282		
Dierkes v. Phila.	248	Eager v. Grimwood	273
Dill v. Bowen	454	Eames v. Sweetser	77
Dillaye v. Greenough	187, 194	Earl v. Ferris	117, 142
Dillon v. Bowles	422	Earl of Ilchester, <i>Re</i>	301, 348
Di Lorenzo v. Di Lorenzo	23	Earle v. Crum	344
Dixon v. Bell	485	v. Reed	429
v. Dixon	146, 148	Eastland v. Burchell	74
v. Merrett	107, 449	Eaton v. Hill	489
Dobbins v. Higgins	475	Eberts v. Eberts	403
Dodge v. Favor	281	Echols v. Fleming	474
Dodson v. McAdams	286	Eckford v. De Kay	400
Doe v. Hassell	401	Edgar v. Castello	272
v. Roe	44	Edmonds' Appeal	47
v. Rusham	199	Edrington v. Leach	477
v. Wilkins	96, 97	Edward's Appeal	295
Doker v. Hasler	55	Edwards, <i>Re</i>	456
Dollner v. Snow	62	v. Crume	277
Donegan v. Davis	281	v. State	52
Donovan's Appeal	155	v. Taliafero	368
Dorin v. Dorin	295	Eller v. Crull	72
Dorrell v. Hastings	426	Ela v. Brand	248, 249, 286
Douglas v. Gansman	172	v. Ela	403
v. State	403	Elderton, <i>Re</i>	259
Douglas's Appeal	387	v. Emmens	471
Douglass v. Ferris	393	Eliot v. Eliot	20
Dove v. State	410	Ellington v. Ellington	274
Dow v. Eyster	66	Ellis v. Cary	287

## TABLE OF CASES.

xxiii

[References are to paragraph numbers.]

Ellis v. Scott	388	Force v. Gregory	441
Elwell v. Martin	489	Ford v. Brooks	7
Emerson v. Spicer	306	Forsyth v. Hastings	452
Emery v. Kempton	266	Fort v. Allen	103
v. Neighbour	74	Fort Wayne R. v. Beyerle	272
v. Steckel	475	Foss v. Hartwell	252 a
v. Ware	104	Foster v. Bisland	393
Emmet v. Norton	69	v. Wilcox	106
English v. Foxall	184	Fountain v. Anderson	362
Epperson v. Nugent	428	Fowle v. Torrey	179
Espey v. Luke	404	Fowler v. Chichester	82
Evans v. Evans	49	v. Kell	209
v. O'Connor	44	v. Lewis	360
v. Walton	274	v. Rice	182, 183, 165
Everitt v. Everitt	194	v. Seaman	160
Exchange Bank v. Watson	185	Fowlkes v. Baker	252 a
		Fox v. Burke	237
		v. Davis	227
		v. Doherty	221
		v. Hawks	116, 199
		v. Kerper	366
		v. Minor	325
		Francis v. Wilkinson	284
		Franklyn v. Sprague	342
		Franklin v. Franklin	40
		v. Mooney	435
		Franklin Savings Bank v. Miller	105
		Franks v. Martin	189
		Fratini v. Caslini	43
		Freeman v. Freeman	283, 287
		v. Hartman	192
		v. Holmes	66
		v. Robinson	252 a
		French v. Currier	871
		Friend v. Lamb	151
		Friermuth v. Friermuth	283
		Fry v. Leslie	438
		Fulgham v. State	47
		Fullam v. Rose	95
		Fuller v. Fuller	21
		v. McHenry	179
		v. Wing	865
		Fulton v. Fulton	49
		Furman v. Van Sise	275
			G.
		Gaffney v. Hayden	452
		Gahn v. Darby	40
		Gaines v. Spann	315
		Gainor v. Gainor	192
		Gale v. Gale	185
		Gall v. Gall	21
		Galt v. Smith	146
		Galvin v. Crouch	274
		Gamber v. Gamber	184
		Gandall v. Pontigny	474
F.			
Fairchild v. Knight	127		
Fairland v. Percy	215 a		
Fant v. McGowan	337		
Farber v. Farber	228		
Fargo v. Goodspeed	146		
Farnham v. Pierce	248, 263, 269		
Farnsworth v. Richardson	263		
Fearon v. Aylesford	227		
Fears v. Brooks	144		
Feilding's Case	23		
Fendall v. Goldsmied	42		
Ferguson v. Bobo	440		
v. Brooks	81		
v. Reed	62		
Ferren v. Moore	73		
Fewings v. Tisdal	461		
Finch v. Finch	186		
Fisher v. Payne	107		
Fitch v. Rathbun	132		
Fitler v. Fitler	248		
Fitzgerald v. Brennan	56		
Fitzpatrick v. Fitzpatrick	20		
Fizette v. Fizette	132		
Fleet v. Perrins	91, 211		
Fleitas v. Richardson	7		
Flenner v. Flenner	182		
Flesh v. Lindsay	81, 98		
Fletcher v. Fletcher	871		
v. People	256		
Flexner v. Dickerson	420		
Flinn, Re	360, 363, 367		
Floyd v. Calvert	26		
Fogler v. Buck	386, 400		
Foley v. Mutual Life Co.	306, 404		
Folger v. Heidel	367		
Foot v. Card	44		
v. Graham	428		
Forbes v. Moore	7		

[References are to paragraph numbers.]

Gans v. Williams	128	Govier v. Hancock	73
Gard v. Neff	362	Graham v. Bennett	240
Gardner v. Gardner	146, 238	v. Dickinson	108
v. Schooley	288, 284	v. Houghtalin	306
Garner v. Gordon	348	Grammel, <i>Re</i>	365
Garvin v. Ingram	202	Grand Rapids R. v. Showers	278
v. Williams	404	Grant v. Green	46
Gayle v. Hayes	286	Grantham v. Grantham	172
Gee v. Scott	56	Gravett v. Malone	408
Gelston v. Frazier	147	Gray v. Dryden	98
Genereux v. Sibley	428	v. Durland	275
Georgia R. R. Co. v. Wynn	85	v. Parke	457
Gholston v. Gholston	47	Green v. Campbell	280
Gibson v. Commonwealth	56	v. Green	454
v. Gibson	83	v. Hudson R. R.	85
Gilbert v. Schwenck	389, 340	v. Johnson	386
v. Wetherell	285	v. Pallas	174
Gilchrist, <i>Ex parte</i>	175	v. State	12
Gill v. Read	248	v. Wilding	417
v. Woods	209	Greenfield Bank v. Crafts	279
Gillespie v. Bailey	450	Greenway v. Conroy	441
v. Beecher	126	Greenwood v. Greenwood	275
v. Worford	105	Gregory v. Lee	424, 430, 452
Gillett v. Gillett	18	v. Winston	192
v. Knowles	90	Griffin v. Reynolds	81, 82
Gilman v. Andrus	66, 69	Griffith v. Schwendeman	420
Gilson v. Spear	440	Grigsby v. Breckenridge	170, 219
v. Zimmerman	208	Grimm v. Taylor	282
Ginn v. Ginn	266	Grinnell v. Wells	271, 273
Gishwiler v. Dodez	260	Growcock v. Hall	463
Given v. Charron	477	Grubb's Appeal	241
Gladding v. Pollett	250	Grundy v. Hadfield	291
Glass v. Glass	21, 888	Guffin v. First National Bank	288, 284
Glaze v. Blake	172	Gulf R. v. Donahoo	98
Gleason v. Gleason	40	Gulick v. Grover	78
Gloucester v. Page	822	Gum v. Swearingen	866
Goldstein v. People	52	Gunther v. State	342
Gonsolis v. Gearhart	465	Guptil v. Horne	79
Goodchild v. Foster	268	Gurley v. Gurley	216
Goodie v. Harrison	452	Guthrie v. Morris	429
Goodenough, <i>Re</i>	268	Guyann v. McCauley	268
Goodnow v. Empire Lumber Co.	447		
Goodrich v. Goodrich	261		
v. Tracy	78		
Goodrum v. State	55		
Gordon v. Dix	278		
v. Gilfoil	407		
v. Potter	252		
Gore v. Gibson	18		
v. Knight	140		
Gorman v. State	47, 256		
v. Wood	89, 131		
Goshen v. Richmond	18, 32		
Gosman v. Cruger	62		
Gosnell v. Jones	61		
Goss v. Stone	323		
Gotts v. Clark	252, 252 a		
Gould v. Carlton	89		
		H.	
		Hackett v. Hackett	222
		Haddock v. Planters' Bank	371
		Haesley v. Winona R.	441
		Hafer v. Hafer	194
		Hagerty v. Powers	277
		Hahn v. Cooper	275
		Haight v. McVeagh	205
		Hailey v. Bond	408
		Hair v. Hair	40
		Haite v. Williams	284
		Hall v. Butterfield	430
		v. Carmichael	192
		v. Hall	246, 282

# TABLE OF CASES.

XXV

[References are to paragraph numbers.]

Hall v. Simmons	450	Hay v. Walker	474
v. Weir	66	Hayes v. Watts	81
Hamaker v. Blanchard	487	Haymond v. Lee	191
v. Hamaker	182	Haynes v. Bennett	420, 450
Hamer v. Cook	379	v. Nowlin	44
Hamilton v. Hamilton	28	Hays v. McConnell	286
v. Hector	227	v. Seward	283
Hamlin v. Jones	103	Headman v. Rose	41
Hammer v. Pierce	272	Heard v. Daniel	365
Hammersley v. De Biel	186, 188	v. Stamford	61, 208
Hammond v. Corbett	268	Heather, Re	848
Hammons v. Renfrew	183	Hebblethwaite v. Hepworth	26
Hamnett's Appeal	400	Hedges v. Tagg	274
Hampstead v. Plaistow	24	Heffer v. Heffer	24
Hampton v. State	55	Heinemann's Appeal	321
Hancock v. Peaty	18	Heirn v. McCaughan	83
Handy v. Foley	81	Henderson v. Wendler	81
Hannen v. Ewalt	867	Hennessy v. Stewart	286
Hanrick v. Patrick	7	Henning v. Harrison	109
Hanson v. Millett	129	Henry v. Henry	182
Hardenburgh v. Lakin	105	v. Root	440, 447
Hardin v. Helton	836	Henson v. Walts	280, 262
Harding v. Harding	261	Herdmann v. Pace	105
v. Weld	320	Herring v. Wickham	185
Hardwick v. Paulet	283	Herrington v. Robertson	209
Hardy v. Bank	370	Hervey v. Moseley	278
v. Waters	418	Hester v. Hester	44
Harland's Case	249	Hetrick v. Hetrick	208
Harley v. Harley	285	Hewlett v. Ragsdale	288
Harper v. Pinkston	83	Heyes v. Heyes	38
Harris v. Berry	366	Heywood v. Brooks	283
v. Butler	274	Hiatt v. Williams	287
v. Carstarphen	404	Higgins v. McClure	403
v. Currier	283	Hightower v. Maull	360
v. Dodge	62	Hilbish v. Hilbish	283
v. Harrison	842	Hill v. Campbell	478
Harrison v. Harrison	284	v. Chambers	127
v. State	16	v. Childress	245
Harshberger v. Alger	152	v. Clark	415
Hartford v. Morris	23	v. Goodrich	208
Harvey v. Briggs	418	v. Hill	261
v. Lane	261	v. McIntire	398
v. Norton	70	v. Nelms	450
Haskell v. Jewell	351	v. Sewald	78
Haskins v. Royster	486	v. State	55
Hassard v. Rowe	368	Hillegass v. Hillegass	458
Hastie's Trusts	295	Hinchliffe v. Koontz	475
Hause v. Gilger	133	Hindman v. O'Connor	344
Haver's Estate	131, 184	Hinkle v. State	256
Hawkes v. Hubback	119	Hitner's Appeal	227
Hawkins v. Hyde	283	Hix v. Gosling	151
v. Jones	291	Hoag v. Martin	177
v. Providence R.	89, 90, 219	Hodgden v. Hodgden	121
v. Watts	249	Hodges, In re	357
Hawkins's Appeal	408	v. Cobb	163
Hawksworth v. Hawksworth	246	Hodgkins v. Rockport	246
Hawley, Re	315	Hodson v. Davis	151
Hawthorne v. Beckwith	61	Hoffman v. Gordon	482



[References are to paragraph numbers.]

Hohnes v. Mather	489	Hutchins v. Colby	161
Holbrook v. Brooks	864, 400	v. Kimmel	26
Holcomb v. Meadville Savings Bank	129	Hutchinson v. Hutchinson	363
Holden v. Curry	325	Huth v. Carondelet R.	448
Hollingsworth v. Swedenborg	264, 281, 282	Hutton v. Harper	30
Hollingsworth's Appeal	316	v. Williams	390
Holmes v. Field	816, 828	Hyatt v. Adams	83, 85
v. Gilman	206	Hyde v. Hyde	21
v. Holmes	80	v. Warren	106
Hood v. Perry	336	Hynes, <i>Re</i>	306
Hook v. Pratt	298	v. McDermott	26
Hooks v. Lee	188	Hysong v. School District	246
Hooper v. Haakel	84		
Hopkins v. Carey	90	I.	
v. Virgin	442	Ihl v. Street R.	272
Horsford, <i>Re</i>	320	Ihler's Goods	215 a
Horton v. Byles	83	Illinois Central R. v. Slater	441
v. McCoy	379	Illinois Land Co. v. Bonner	418
Hough v. Comstock	278	Illinois R. R. Co. v. Grable	98
Houston R. v. Miller	276	Indianapolis Chair Co. v. Wilcox	422, 451
Hoverson v. Noker	277	Ingham v. Bickerdike	335
Hovey v. Harmon	334	Inman v. Inman	440, 450
Howard v. Daly	478, 474	Insurance Co. v. Bangs	456
v. Digby	169	Irvine v. Irvine	419, 447, 448
Howarth, <i>Re</i>	375	Isaacs v. Taylor	334
Howe v. Hyde	89	Izard v. Izard	228
Howell v. Tyler	295	Izod v. Lamb	122
Hower v. Ulrich	277		
Hoxsie v. Potter	260	J.	
Hoyle v. Stowe	449		
Hoyt v. Casey	428		
v. Sprague	346, 865	Jack's Appeal	371
v. Wilkinson	424	Jackson, <i>Re</i>	375
Hubard v. Bugbee	68	v. Jackson	164, 233, 287, 285, 291
Hubbard, <i>Re</i>	320	v. Kirby	81, 82
Huchting v. Engel	438	v. Peek	284
Hudson v. Helmes	365	v. Winne	23, 26
Huff v. Price	78, 99	Jacksonville R. v. Mitchell	90, 170
Hughes v. Knowlton	295	Jacox v. Jacox	284, 344
v. Ringstaff	389	James v. Allen Co.	474
Hughes's Appeal	367	v. James	45
Hultz v. Gibbs	72	Janes v. Cleghorn	322
Humes v. Scruggs	132	Janes's Estate	237
Humphrey v. Buisson	369	Jaques v. Methodist Episcopal Church	144, 147
Humphries v. Harrison	108	v. Sax	428
Hunt v. Adams	264	Jarrett v. State	823
v. Hayes	74	Jenness v. Emerson	265
v. Johnson	199	v. Jenness	45
v. Thompson	428	Jenney v. Gray	99
Hunt's Appeal	28, 187	Jennings v. Davis	199
Hunter v. Bryant	187	v. Lyons	461, 476
Huntley v. Whitner	62	Jeston v. Key	193
Huntoon v. Hazleton	273	Jewell v. Jewell	29
Huntsman v. Fish	325	Jewett v. Jewett	45
Hussey v. Ryan	276		
Hutcheson v. Peck	43		

## TABLE OF CASES.

xxvii

[References are to paragraph numbers.]

Jodrell v. Jodrell	169	Kemp v. Downham	74
John v. Bradbury	342	Kempe v. Pintard	108
Johns v. Emmett	296, 348	Kendall v. Kendall	249
v. Johns	28	Kennedy v. Baker	461
Johnson v. Blair	359	v. Shea	274
v. Burford	7	Kennison's Trusts	249
v. Gallagher	142, 143, 173	Kent v. Rand	63
v. Johnson	88, 89, 93, 131, 201	Kenton Ins. Co. v. McClellan	157
v. Silabee	282	Kenyon v. Farris	66
v. State	256, 418	v. Saunders	127, 207
v. Stone	279	Kerr v. Bell	454
Johnston v. Sumner	69, 71, 74	v. Forgue	442
Johnstone v. Beattie	315	Kershaw v. Kershaw	285
v. Marks	427	Kerwin v. Wright	281
Jolly v. Rees	68	Kesner v. Trigg	200
Jones, <i>Re</i>	200	Kevan v. Waller	340
v. Aetna Ins. Co.	124	Keyes v. Keyes	23
v. Brewer	434	Kibbie v. Williams	99
v. Carter	100	Kilcrease v. Shelby	484
v. Clifton	199, 201	Kilgore v. Jordan	440
v. Darnall	260	v. Rich	427, 429
v. Graham Trans. Co.	465	Kimball v. Fisk	325
v. Jones	7	v. Perkins	371, 390
v. Parker	356	King v. Bell	326, 342
v. Plummer	103	v. Foxwell	39
v. Potter	203	v. Goodwin	218
v. Reid	172	v. Hughes	388
v. Wocher	78	v. Seals	362
Jones's Appeal	185	v. Thompson	84, 174
Jordan v. Foxworth	474	Kingman v. Perkins	421
v. Jones	104	Kingsbury v. Powers	360, 361, 377
Judd v. Ballard	448	Kingsley v. Broward	295
Judge of Probate v. Hinds	320	Kingsman v. Kingsman	108
K.			
Kahn v. Israelson	323	Kinnard v. Daniel	188, 191
Kain v. Larkin	284	Kinnen v. Maxwell	428
Kauffelt v. Moderwell	266	Kinney v. Laughenour	274
Kavanaugh v. Janesville	84	v. Showdy	418
Kay v. Whittaker	102	Kinsey v. State	249
Kaye v. Crawford	284	Kirkpatrick v. Clark	183, 147
Kaye's Case	321, 322	Kirksey v. Friend	127
Keagy v. Trout	127	Kirwin v. Weippert	144
Keating v. Condon	221	Kitchell v. Mudgett	62
Keaton v. Davis	252	Kitchen v. Bedford	199
Keech v. Keech	40	Kline v. Beebe	299
Kekewich v. Manning	199	Kline's Estate	192
Kelchner v. Forney	408	Klingman v. Holmes	276
Keller v. Phillips	68, 71	Knapp v. Knapp	228
Kelley v. Davis	252	Knight v. Knight	47
v. Mayberry	84	v. Wilcox	274, 275
Kellogg v. Adams	284	Knott v. Cottee	349
v. Robinson	78	Knowles v. Knowles	147
Kelly v. Drew	182, 172	Knox v. Bushell	66
v. Kelly	48	v. Flack	421
v. Owen	41	Knye v. Moore	293
Kemp v. Cook	440	Kramer v. Mugell	323
		Kroessen v. Keller	44
		Krumm v. Bench	82 a
		Kurtz v. Hibner	283, 284

## TABLE OF CASES.

[References are to paragraph numbers.]

L.		Line v. Lawder	408
Lacy v. Getman	476	Lines v. Lines	216
Ladd v. Lynn	66	Lipe v. Eisenlerd	283
Ladders v. Mutual Loan Co.	249	Lippincott v. Mitchell	130
Lake r. Lake	7	Lister v. Stubbs	487
Lally v. Fitz Henry	349	Livernois, Re	249
Lamar v. Micou	306, 320, 350, 365, 371	Liverpool Loan Association v. Fair-	
Lamb v. Lamb	192	hurst	82 a
Lamb's Appeal	372	Livingston v. Hammond	286
Lamprière v. Lange	440	Lloyd v. Fulton	182
Lane v. Cotton	482	v. Pugh	95
v. Duchac	42	Lochman v. Brobst	165
v. Ironmonger	68, 69	Locke v. Smith	428
v. Taylor	365, 368	Logan v. Fairlee	323
Langdon v. Clayton	451	v. Gardner	107
Lannoy v. Duchess of Athol	54	v. Thrift	106
Lansing v. Michigan R.	422	Lomax v. Smyth	161
Lapsley v. Grierson	238	Lombard v. Morse	204
Lapworth v. Leach	248	London Bank of Australia v. Lem-	
Larkin v. Hecksher	465	priere	143
Larsen v. Johnson	182	Long v. Kinney	79
Larson v. Chase	210, 222	v. McKay	134
Latham v. Latham	231	v. Morrison	85
v. Myers	353	v. Rankin	63
Laton v. Balcom	102	Loomis v. Newhall	252 a
Lauderdale Peerage	30	Lord v. Hough	322, 348
Laughlin v. Eaton	83	v. Locke	284
Law's Estate	369	Lorimer v. Lorimer	26
Lawrence v. Brown	74	Louisville R. v. Shanks	442
v. Lawrence	49, 74	Love v. Graham	194
v. McArter	421	v. Logan	369
v. Spence	273	Lovelace v. Smith	368
Lawyer v. Fritcher	273	Low v. Hanson	342
Leach v. Noyes	105	Lower Augusta v. Salinsgrove	292
v. Prebster	221	Lowndes v. Lowndes	295
Leavitt v. Leavitt	28, 24	Lowry v. State	372
Leaycraft v. Hedden	144	Loyd v. Malone	377, 400
Lebanon v. Griffin	278	Lucas v. Brooks	56
Lee v. Lanahan	62, 127	v. Rickerich	99
v. Lee	371	Ludwig's Appeal	194
Lee's Appeal	317	Luhra v. Eimer	41
Legg v. Goldwire	193	Lumley v. Gye	273, 276, 486
Leitensdorfer v. Hempstead	450	Lunday v. Thomas	360
Lemley v. Atwood	399	Luther v. Cote	62
Lemon v. Hansbarger	396	Lynch v. Lynch	88
Lenderman v. Talley	92	Lyndon v. Lyndon	23, 24
Leuppie v. Osborn	66	Lyon v. Bolling	281
Levett v. Penrice	70	v. George	461
Lewis v. Allred	389		
v. Ames	26	M.	
v. Edwards	353	McAfee v. Kentucky University	40
v. Lewis	23	v. Robertson	7, 78
v. Sawyer	482	McCahan's Appeal	365
Libby v. Van Derzee	388	McCaleb v. Crichfield	94
Lilley v. Elwin	474	McC Campbell v. McC Campbell	201
Lincoln v. Alexander	339	McCarragher v. Rogers	441
Lindo v. Belisario	12, 26		

## TABLE OF CASES.

xxix

[References are to paragraph numbers.]

McCarthy v. Henderson	424	Magniac v. Thompson	184, 197
v. Nicrosi	422	Maguire v. Maguire	12
McCarty v. Murray	421	Mallinson v. Mallinson	262
v. Woodstock Co.	420	Manby v. Scott	68
McCheesney v. Brown	144	Mangan v. Atterton	441
McClellan v. Filson	210	Mann v. State	55
McClintic v. Ochiltree	147	Marchand v. Griffon	161
McClosky v. Cyphert	281, 282	Margrett, <i>Ex parte</i>	419
McClure v. Commonwealth	344	Marheineke v. Grothaus	350
v. McClure	488	Marquess v. Le Baw	353
McClurg v. Terry	23, 26	Marr's Appeal	403
McClurg's Appeal	88	Marsh v. Marsh	55
MacConnell v. Lindsay	136, 144	Marshall v. Oakes	81
McCoon v. Smith	438	v. Reams	256, 262, 292
McCormick v. McCormick	38	v. Rutton	73
v. Penn. Central R.	219	Marston v. Bigelow	279
McCowan v. Donaldson	182	Martin v. Davis	366
McCrary v. Lowell	269	v. Foster	336
McDavid v. Adams	89	v. State	410
McDonald v. Boeing	463, 474	v. Stevens	366
McDowell v. Bonner	348	Mason v. Buchanan	369
v. Georgia R.	276	v. Fuller	123
McDuff v. Beauchamp	203	v. Hutchins	266
McElfresh v. Kirkendall	82	v. Mason	22
McElhenny's Appeal	390	Mathews v. Cowan	430
McElheny v. Musick	365	v. Wade	325
McEmurray v. Turner	266	Matthew v. Central Pacific R.	85
McEroy's Case	18	Matthews v. Brise	369
McGale v. McGale	388	v. Copeland	99
McGeary v. McGeary	357	Matthewson v. Perry	266
McGrath, <i>Re</i>	302, 333	Maul v. Vaughn	221
v. Donnelly	71	May v. Duke	401
McGuiness v. Butler	441	v. Skinner	368
McGuire v. Grant	463	Mayer v. McLure	453
McHenry v. Davies	73	Mayhew v. Mayhew	38
McIntosh's Estate	389	v. Thayer	66, 72
McKanna v. Merry	353, 423	Maynard v. Vinton	55
McKee v. Reynolds	227	Mayo v. Hutchinson	151
McKinney v. Clarke	24	Meakin v. Morris	435
v. Jones	860	Mears v. Bickford	266
McKnight v. Walsh	251	Medworth v. Pope	295
McLaurie v. Partlow	268	Meek v. Perry	403
McMahill v. McMahill	285	Meister v. Moore	29, 80, 34
McMahon v. Lewis	70	Melbourn, <i>Ex parte</i>	7
v. Sankey	266	Melvin v. Melvin	38
McMillen v. Lee	252 a	Mendes v. Mendes	315
McMullen's Appeal	160	Menvill's Case	99
M'Myn, <i>Re</i>	210	Mercein v. People	263
McNally v. Weld	222	Mercer v. Jackson	272
McNeer v. McNeer	127	Merkell's Estate	390
Mack v. Brammer	369	Merritt v. Fleming	293
v. State	215 a	v. Simpson	368
Mackall v. Mackall	284	v. Whitlock	203
Mackin v. Morse	872	Metropolitan Bank v. Taylor	151
Macley v. Equitable Co.	365, 369	Mette v. Felten	450
Macready v. Wilcox	306, 349	Mewhirter v. Hatten	84
Magee v. Holland	276	Meyers v. King	201
Magee's Estate	291	Michael v. Dunkle	44

[References are to paragraph numbers.]

Michael v. Locke	366	Moseley v. Rendell	221
Mickelberry v. Harvey	76, 78	Mott, <i>Re</i>	872
Miller v. Harris	315	Mowbray v. Mowbray	250
v. Miller	291	Moyer v. Fletcher	353
v. Simonds	284	Muller v. Benner	339
v. Smith	422	Munroe v. Phillips	344
v. State	52, 55	Munson v. Washband	427
v. Williamson	169	Murley v. Roche	442
Miller's Estate	368	Murphree v. Singleton	95
Mills v. Wyman	278	Murphy, <i>Ex parte</i>	261
Miner v. Miner	260	v. Green	405
Mitchell v. Mitchell	127	v. Ottenheimer	252 a
v. Seitz	172	Murray v. Murray	192
v. Union Ins. Co.	267	Myers v. Myers	249
Mizen v. Pick	64, 73	v. Pearsoll	334
Modawell v. Holmes	335	v. Wade	356
Modisett v. McPike	44	Myrick v. Jacks	401
Mohney v. Evans	427	Myrick's Prob.	7
Mohry v. Hoffman	274		
Monaghan v. Fire Ins. Co.	418		
v. School District	264, 281	N.	
Monell v. Scherrick	284		
Montague v. Benedict	68, 70	Naden, <i>Ex parte</i>	16
Montgomery v. Carlton	422	Nance v. Nance	371, 387
v. Henderson	188	Nash v. Mitchell	151
Monumental Association v. Her-		Natchez R. v. Cook	271, 272
man	420	Nathans v. Arkwright	420, 450
Moody v. Hemphill	91	Neal v. Berry	423
v. Matthews	96	v. Gillett	438
Moon v. Towers	277	v. Gilmore	286, 475
Moore v. Baker	450, 454	Needham v. Bremner	73
v. Christian	273	Needles v. Needles	91
v. Cornell	105	Neeld v. Neeld	49
v. Hegeman	238	Neilson v. Brown	44, 84
v. Moore	260	Nelson v. Garey	78
v. Richardson	99	v. Miller	151
v. Shields	890	v. Wyan	285
v. Stevenson	229	Nesbitt v. Turner	63
v. Webster	119	Neves v. Scott	188
v. Whittaker	32	Nevins v. Gourley	127
Moore v. Moores	38	Nevins, Violet, <i>Re</i>	322, 357
Moran v. Dunphy	488	New Hampshire Ins. Co. v. Noyes	426
Mordaunt v. Moncrieffe	281	Newlands v. Paynter	140
Moreland v. Davidson	474	Newman v. Reed	371
Morgan v. Hannas	390	Newport v. Cook	251
v. Hughes	68	Newton v. Janvrin	320
v. Smith	278	Nichol v. Steger	428
Moritz v. Garnhart	294	Nicholson v. Wilborn	77
Morris v. Davies	237	Nicholson's Appeal	333, 334, 365
v. Palmer	66	Nicol v. Nicol	228
Morrison v. Kinstra	380	Nightingale v. Withington	264
v. Morrison	231	Niles v. Hall	127
Morrissey, <i>Re</i>	435	Nine v. Starr	293
Morse v. Ely	428, 454	Nissley v. Heisey	129
v. Morse	38, 40	Noice v. Brown	273, 486
Mortimore v. Wright	252	Nonnemacher v. Nonnemacher	18
Morton v. Rainey	287	Norcross v. Norcross	30
Moseby v. Partee	105	Nordholt v. Nordholt	482

# TABLE OF CASES.

xxx

[References are to paragraph numbers.]

Norris v. Lantz	94	Parker v. Parker	18
North v. James	455	v. Pratt	480
North Penn. R. v. Mahoney	442	v. Simonds	177
Northern Central R. v. Mills	85	Parks v. Barrowman	104
Northrop v. Knowles	80	v. Cushman	92
Norton v. Ailor	286	Parr v. State	398
v. Nichols	62	Parsons v. Keys	428
Norwood v. Stevenson	86	v. Traak	462
Nostrand v. Ditmis	70	Parton v. Hervey	20
		Partridge v. Stocker	174
		Passenger R. v. Stutler	444
		Patrick v. Littell	151, 152
		Pattee v. Harrington	83
		Patten v. Patten	133
		Patterson v. Booth	400
		v. Gaines	21
		Patton v. Charlestown Bank	144
		v. Hassinger	252 a
		Paul v. Children	295
		v. Hummel	277
		v. Paul	185, 195
		Payne v. Williams	43
		Peacock v. Linton	252
		v. Peacock	349
		Peacock's Trusts	221
		Peaks v. Mayhew	51
		Peale v. Thurman	367
		Pearce v. Foster	465
		v. Olney	249
		Pearson v. Darrington	66, 74
		Peaslee v. McLoon	55
		Peck v. Peck	26, 28
		Pellage v. Pellage	283
		Pelletier v. Couture	423
		Pemberton Building Association	
		v. Adams	440
		Penfold v. Mould	199
		Penn v. Whitehead	174
		Pennington v. Fowler	844
		Penn. R. R. Co. v. Kelly	276
		Pennsylvania R. v. Keller	272
		Penso v. McCormick	441
		People v. Board of Education	246
		v. Clark	274
		v. Ewer	253
		v. Mercein	260, 266
		v. Olmstead	260
		v. Pettit	45
		v. Seelye	328, 397, 404
		v. Slack	20
		v. Turner	269
		v. Watts	262, 349
		v. Westbrook	54
		v. Wilcox	348
		v. Winters	47
		v. Wright	52
		Perkins v. Perkins	200
		v. Tooley	383
O.			
Obermayer v. Greenleaf	185		
Occleston v. Fullalove	295		
O'Connor v. Briggs	478		
O'Daily v. Morris	62		
O'Flaherty v. Union R.	442		
Ogborn v. Francis	274		
Oglesby Coal Co. v. Pasco	62, 108		
Oinson v. Heritage	73		
O'Keefe v. Casey	337		
Oliver v. Oliver	86		
v. Woodruffe	421		
Olmstead v. Keyes	209		
Olney v. Howe	77		
Olsen v. Thompson	390		
Olsen Co. v. Youngquist	75		
Opdyke's Appeal	291		
Ordinary v. Dean	360		
O'Rourke v. Life Ins. Co.	422		
Orthwein v. Thomas	237		
Osborn v. Allen	257		
v. Gillett	272, 485		
Osborne v. Edwards	94, 99		
v. Van Horn	250, 251		
Osgood v. Bliss	191		
Otis v. Hall	363		
Otte v. Becton	251		
Overton v. Bannister	440		
Owen v. Peebles	371		
Owens v. Dickenson	142		
v. Mitchell	390		
Owings v. Tucker	451		
Oxley v. Tryon	422		
P.			
Packard v. Arellanes	7		
Page v. Wells	480		
Paine v. Hollister	209		
Palmer v. Garland	379		
v. Oakley	317		
v. Trevor	92		
Parke v. Kleeber	66		
Parker v. Collins	160		

## TABLE OF CASES.

[References are to paragraph numbers.]

Perry v. Carmichael	268, 342	Price, <i>In re</i>	48
v. Simpson	474	v. Hewett	440
Person v. Chase	419, 422	v. Jenkins	185
Peters v. Fleming	426	v. Price	44, 79
Peterson v. Haffner	438	v. Sanders	427, 429
Pharis v. Leachman	98	v. Strange	216
Phelps v. Phelps	92	Prichard v. Prichard	47
v. Walther	229	Prime v. Foote	321
Phillips v. Barnet	54	Prout v. Hoge	128
v. Culliton	228	v. Wiley	447
v. Lloyd	427	Pulling, <i>Re</i>	192
v. Probyn	185	Putnam v. Tennyson	68
Phillipson v. Hayter	66	Pyatt v. Pyatt	250
Philpot v. Bingham	417, 421		
Picard v. Hine	142, 148		
Pickens v. Kniseley	144		
Pickering v. DeRochemont	83, 396	Q.	
Pickler v. State	421	Qualter's Estate	134
Pierce v. Millay	272, 442	Queen v. Cresswell	80
v. Pierce	194, 250	v. Kenny	58
v. Prescott	401	v. Nash	292
Pierpont v. Wilson	72	Quincy v. Quincy	73
Pigott v. Pigott	97		
Pike v. Baker	78, 129, 201		
v. Fitzgibbon	148		
Pillar v. Pillar	47	R.	
Pinney v. Fellows	124	Railroad Co. v. Watly	271
Pippen v. Wesson	151, 157	Railway Co. v. Maddry	254
Pitt v. Pitt	97	Rains v. Hays	285
Poffenberger v. Poffenberger	172	Ralston v. Kohl	475
Poland v. Earhart	272	Ramsay v. Ramsay	349
Pollard v. New Jersey R.	85	v. Thompson	296
Pond v. Hopkins	360	Randall v. Randall	46, 201
Porch v. Fries	107, 330	v. Sweet	429
Port v. Port	26, 28	Ransom v. Nichols	209
Porter v. Bleiler	395	v. Ransom	202
v. Dunn	89, 172	Ransome v. Burgess	249
v. Powell	252	Rawlings v. Bell	472
Porter's Appeal	285	Rawlins v. Rounds	83
Porterfield v. Augusta	39	Rawson v. Corbett	372, 388
Pote's Appeal	296	v. Pennsylvania R. R. Co.	219
Pottinger v. Wightman	350	Ray v. Haines	452
Potter v. Hiscox	369	v. Natural Gas Co.	62
v. Potter	172	v. Tubbs	429, 444
Powell v. Cobb	24	Raymond v. Sawyer	360
v. Powell	40	Raynes v. Bennett	66
v. State	256	Reade v. Livingston	186
Pratt v. Baker	353	Reading v. Wilson	353
v. Pratt	288	Rendy v. Pinkham	451
Pray v. Gorham	266	Ream v. Watkins	281
Prebble v. Boghurst	187	Reando v. Misplay	283
Prentiss v. Ledyard	465	Redgrave v. Redgrave	55
v. Paisley	194	Reed v. Lane	419
Prescott v. Brown	88	v. Timmins	372
v. Norris	439	Rees v. Keith	92
Preston v. Bancroft	72	Reeves v. Webster	131
Prevot v. Lawrence	128	Regina v. Gynghall	348
Prewitt v. Wilson	185	v. Jackson	48, 51

## TABLE OF CASES.

xxxiii

[References are to paragraph numbers.]

Regina v. Kelly	48	Robinson v. Coulter	420
v. Lord	419	v. Gee	220
v. Millis	23, 28, 29	v. Hersey	368
v. Nicholas	413	v. O'Neal	130
v. White	256	v. Robinson	62
Remington v. Field	367	v. Weeks	419, 422
Renaus v. Teakle	69	Roche v. Chaplin	362
Rennie v. Ritchie	115	Rodgers v. Lees	441
Renz, <i>Re</i>	151	v. Pike County Bank	92
Rex v. Burton	28	Rogers v. Brooks	98
v. Flintam	65	v. Cunningham	194
v. Greenhill	256, 259, 260	v. Millard	286
v. Minshull	24	v. Smith	271
v. Wilson	428	v. Turner	252
Reynold v. Reynold	251	v. Wolfe	182
Reynolds v. Reynolds	28	Rollins v. Marsh	339, 353, 361
v. Robinson	89	Rooney v. Milwaukee Chair Co.	276
v. Sweetser	72	Roper's Trusts	250
Rhea v. Rhenner	229	Rose's Estate	342
Rice v. Boyer	440	Ross v. Ross	74
v. Hoffman	129	v. Singleton	63
v. Rice	32	v. Southwestern R.	320
Rice's Case	319	Roth's Estate	403
Richards v. Burden	55	Roundy v. Thatcher	452
v. Richards	47	Rowley v. Unwin	149
Richardson v. Boynton	382, 383	Royer's Appeal	365
v. Du Bois	78	Ruchizky v. De Haven	422
v. Kimball	482	Rugh v. Ottenheimer	12
v. Merrill	182, 172	Rumney v. Keyes	248
v. Pote	450	Runkle v. Runkle	45
v. Richardson	367	Ruscombe v. Hare	220
v. Stodder	146	Rush v. Vanvacter	260, 262
Richardson's Case	268	v. Vought	230
Richmond v. Adams Bank	329	v. Wick	418
Ricker v. Charter Oak Ins. Co.	269	Russell v. St. Aubyn	193
Rickerstriker v. State	55	Russell's Appeal	194
Riddle v. McGinnis	274	Ruttinger v. Temple	293
Rider v. Kelso	284	Ryan v. Growney	440
Riggs v. Fisk	450	Ryder v. Hulse	127
Riley v. Byrd	291	v. Wombwell	426, 427
v. Mallory	422, 424, 452		
v. Riley	97, 98, 186		
Rinehart v. Bills	43, 44		S.
Ring v. Jamison	453		
Risdon's Goods	211	Sabel v. Slingluff	103
Rivers v. Carleton	172	Sage v. Hammonds	389
v. Gregg	428	St. Ferdinand Academy v. Bobb	286
v. Thayer	188	St. George v. Biddeford	18
Roadcap v. Sipe	82	v. Wake	192
Robb's Appeal	56	St. John's Parish v. Bronson	66
Robert v. Morrin	396	St. Louis R. v. Higgins	453
Roberts v. Coleman	285	Sale v. Saunders	99
v. Frisby	200	Sallee v. Arnold	90
v. Kelley	77	Salter v. Howard	486
Robertson v. Cole	24	Sanders v. Forgasson	393
v. Lyon	310	v. Miller	185
v. State	28	Sanderson v. Sanderso	333
Robinson v. Burton	276	Sandford v. Pollock	165



## TABLE OF CASES.

[References are to paragraph numbers.]

Sandiland, <i>Ex parte</i>	51	Shaw v. Bates	872
Sapp v. Newsom	23	v. Coble	890
Sargent v. Mathewson	278	v. Coffin	439
Satterthwaite v. Emley	188	v. Emery	78
Saumm v. Coffelt	432	v. Shaw	49
Saunders v. Saunders	47	Sheahan v. Wayne	364, 369
Savage v. Dickson	380	Shelton v. Hadlock	208
Sawyer v. Knowles	395	Sherburne v. Hartland	281
v. Sauer	271, 276	Sherlock v. Kimmel	264, 266
Scanlan, <i>Re</i>	302, 357	Sherman v. Champlain Trans. Co.	474
Scarritt, <i>Re</i>	263	v. Hannibal R.	441
Schneider v. Starke	99	v. Wright	325, 344
Schoch v. Garrett	286	Sherry v. Sansberry	404
Schoenberg v. Voight	266	Sherwood v. Smith	285
Scholes v. Murray Iron Works Co.	39	Shipp v. Bowmar	144
Schreyer v. Scott	197	v. Wheelless	376
Schrimpf v. Settegast	288	Shirley v. Shirley	146
Schroeder v. Loeber	182	Short v. Battle	146
Schrutckfield v. Sauter	182	Showers v. Robinson	242
Schultz v. State	56	Shuford v. Alexander	441
Schumpert, <i>Ex parte</i>	280	Shuman v. Shuman	237
Schunckle v. Bierman	252 a, 273	Shumard v. Phillips	379
Scobey v. Gano	334	Shurtleff v. Millard	452, 454
Scott v. Gambler	95	v. Rile	351
v. Paquet	18	Simmons v. McElwain	70
v. Sebright	23, 24	Stimpson v. Graves	185
v. Shufeldt	23, 24	v. Grayson	274
v. Watson	438	Sims v. Bardoner	455
v. White	282	v. Everhardt	107, 424, 440
Scott's Case	342	v. Rickets	180, 201
Scott's Estate	227	v. Spalding	103
Scranton v. Stewart	448	Singer Man. Co. v. Lamb	449
Sears v. Giddey	210	Siter v. McClenachan	103, 106
Seaver v. Adams	44	Skean v. Skean	45
v. Morse	476	Skillman v. Skillman	90, 172, 184
Seavey v. Seavey	283	Skinner, <i>Ex parte</i>	258
Second National Bank v. Merrill	283	v. Tirrell	66
Seguin's Appeal	401	Skogland v. Street R.	85
Seigler v. Seigler	890	Slaughter v. Glenn	180
Seiler v. People	52	Slauter v. Favorite	371
Seitz's Appeal	287	Slaymaker v. Bank	92
Selden v. Bank	128	Sleeman v. Wilson	296
Selden's Appeal	268	Smalley v. Anderson	83
Self v. Taylor	452	Smiley v. Smiley	78
Selleck v. City of Janesville	84	Smith v. Abair	170
Senft v. Carpenter	40	v. Bate	835
Senseman's Appeal	348, 395	v. Bragg	261
Sequin v. Peterson	267, 279	v. Chappell	184
Sergent v. Sergent	231	v. Davis	66, 387, 388
Sessions v. Trevitt	56	v. Dibrell	369
Sewall v. Roberts	248	v. Gray	450
Sewell v. Sewell	451	v. Hestonville R.	272
Shafer v. Ahalt	83	v. Kron	438
Shaffner v. Briggs	375	v. Low	449
Shallcross v. Smith	62	v. Moore	188, 191
Shanks v. Edmondson	91	v. Railroad	418
Sharpe v. Foy	185	v. Smith	18, 23, 265
Shaver v. Ingham	465	v. Velie	475

## TABLE OF CASES.

XXXV

[References are to paragraph numbers.]

Smith's Appeal	358	State v. Kluseman	410
Smout v. Liberry	223	v. Joest	380
Smyley v. Reese	210	v. Jones	256, 274
Sneathen v. Sneathen	21, 451	v. Learned	410
Snediker v. Everingham	266, 281	v. Lewis	325
Snider v. Ridgeway	62	v. Mabrey	51
Snodgrass's Appeal	368	v. Miller	28
Snover v. Prall	357	v. Morrison	869
Snyder v. People	53	v. Murray	399
Sottomayor v. DeBarros	16	v. Oliver	47, 51
Soule v. Bonney	23	v. Parkerson	52
Southwestern R. v. Chapman	268, 800	v. Pitts	171
Southwick v. Southwick	38	v. Plaisted	420, 448
Sparhawk v. Sparhawk	249	v. Potter	52
Spelman v. Terry	360, 367	v. Ransell	65
Spencer v. Carr	420	v. Scanlan	418
v. Lewis	99	v. Stewart	386
Spicer v. Earl	452	v. Walker	483
Spier's Appeal	229	v. Weatherwax	436
Spotswood v. Barrow	465	v. Wheeler	389
Spring v. Kane	879	v. Womack	390
Springfield v. Bethel	286	State Nat. Bank v. Robidoux	106
Stall v. Meek	78	Steel v. Steel	283
Standard Paint Co. v. Mining Co.	96	Steele, Re	390
Stanford v. Murphy	56	Stehman v. Huber	99
Stanley's Appeal	369	Stein v. Bowman	55
Staples's Appeal	210	Stelz v. Shreck	203
Stark v. Gamble	872	Stephens v. James	823
Starke v. Harrison	99	Stephenson's Goods	207, 343
Starkey v. Starkey	38	Sterling v. Sims	92
Starling v. Balkum	353	Stevens v. Story	73, 75
Starrett v. Jameson	889	Stevenson v. Gray	30
State v. Alford	256	Stewart, Re	95
v. Anderson	264	v. Mulholland	191
v. Baird	260	v. Munchandler	17
v. Barney	260	v. Robertson	27
v. Barrett	263	Stickney v. Stickney	56
v. Barton	410	Stiff v. Keith	418
v. Bennett	55	Stilphen v. Stilphen	127
v. Binder	448	Stock v. McAvoy	285
v. Burton	256	Stockley v. Goodwin	466
v. Camp	52	Stockton v. Wooley	217
v. Cleaves	52	Stogdon v. Lee	122, 143
v. Clottu	269	Stokes v. Shannon	157
v. Craton	48	Stone v. Hills	489
v. Davis	23	v. Stone	278
v. District Board	246	v. Wood	204
v. Dole	31	Storey v. Ashton	489
v. Driver	51	Storey's Appeal	285
v. Foy	387, 401	Stothoff v. Reed	300
v. Greensdale	362, 401	Stoughton's Appeal	867, 375
v. Harris	17	Stout v. Perry	129
v. Harrison	871	Stowers v. Hollis	435
v. Hays	219	Stratton v. Stratton	194
v. Hoater	893	Stringer v. Life Ins. Co.	448
v. Housekeeper	83	Strode v. Strode	21
v. Hulick	128	Strohl v. Levan	277
v. Hyde	851	Strong v. Foote	427

[References are to paragraph numbers.]

Stroop v. Swarts	82	Thayer v. White	252 a
Strother v. Law	106	Tholey's Appeal	80
Stroup v. State	328	Thomas v. Thomas	66, 248
Strouse v. Leipf	98	Thompson v. Dorsey	262 a
Stubbs v. Dixon	248	v. Howard	273
Studwell v. Chapter	440	v. Thompson	66
Sturbridge v. Franklin	73	Thorndike v. Hinckley	396
Sturgis v. Champneys	94	Thorne v. Dillingham	88
Sturtevant v. Starin	75	Thorp v. Thorp	22
Suav v. Caffé	179	Thorpe v. Shapleigh	78, 77
Succession of McLean	7	Thrall v. Wright	427
Sullivan v. Horner	254	Thurber v. Sprague	285
v. Sullivan	55	Thurston, Re	372
Summers v. Howard	400	v. Holbrook's Estate	325
Sutton v. Chetwynd	185	v. Sinclair	342
v. Huffman	274	Tift v. Tift	277, 438
v. Warren	84	Tillman v. Shackleton	174
Swain v. Tyler	252 a	v. Tillman	103
Swan v. Wiswall	105	Tillotson v. McCrillis	282
Swetzer v. Kee	46	Tinsley v. Roll	180
Swing v. Woodruff	62	Tobey v. Smith	62
Switzer v. Ker	283	v. Wood	448
v. Switzer	227	Todd v. Lee	151, 174
Sword v. Keith	268	v. Oviatt	213
Sykes v. Lawlor	271	v. Weber	293
Synge v. Synge	184	Toler v. Slater	101
		Tomkins v. Tomkins	252
		Tong v. Marvin	321
		Torrens v. Campbell	282
		Torrey v. Black	860, 367
		Towle v. Dresser	422, 455
		v. Swasey	217
		Towne v. Wiley	489
		Townley v. Chicago R.	441
		Townsend v. Downer	483
		v. Kendall	349
		v. Tallant	342
		Tracy v. Keith	62
		Trainer v. Trumbull	480
		Tremain's Case	246
		Tripp v. Gifford	444
		Tritt v. Colwell	91, 98
		Troutbeck v. Boughey	118
		Trowbridge v. Carlin	47
		Trull v. Eastman	285
		Tucker v. Andrews	192
		v. Moreland	450
		v. State	51
		Tucker's Appeal	204
		Tuel v. Weston	489
		Tullett v. Armstrong	115, 119, 147
		Tune v. Cooper	90
		Tunison v. Chambley	448
		Turner, Re	322
		v. Collins	284
		v. Cook	55
		v. Kelly	144
		v. Turner	251

## T.

Tally v. Heffner	7
Tanham v. Nicholson	284
Tanner v. Skinner	872
Tarbell v. Tarbell	184
Tasker v. Stanley	43, 44
Tate v. Stevenson	328
Taylor, Re	259, 261, 315
v. Bemiss	863
v. Dansby	418
v. Hite	869
v. Jeter	242
v. Kilgore	860
v. Rountree	127
v. Shelton	70
Teagarden v. McLaughlin	277
Teasdale v. Braithwaite	189
Templeton v. Stratton	248
Tenbrook v. McColm	338
Tennessee Hospital v. Fuqua	383
Tennessee Man. Co. v. James	266
Terry v. Hutchinson	274
v. McClintock	449
v. Tuttle	379
Texas v. Crowder	272
Texas R. v. Brick	442
Thacher v. Phinney	98
Thackray's Appeal	867
Thaw v. Ritchie	879

## TABLE OF CASES.

xxxvii

[References are to paragraph numbers.]

Turpin v. Turpin	418, 422	Waldo v. Goodsell	85
Tuteur v. Chicago R.	254	Waldron v. Waldron	44
Tweedale v. Tweedale	405	Wales v. Miner	44
Tyler v. Arnold	252 a	Walke v. Moody	879
v. Burrington	286	Walkenhorst v. Lewis	422, 458
v. Sanborn	36	Walker v. Browne	353
Tyson v. Latrobe	368	v. Cronin	486
v. Sanderson	372	v. Howard	7
		v. Loughton	75
		v. Stringfellow	227
		v. Walker	91, 285
		Wall v. Stanwick	299, 339, 344
		Wallace v. De Young	487
		v. Latham	447, 450
		v. Lewis	450
		v. Wallace	198
		Wallingsford v. Allen	201
		Wallis v. Bardwell	427
		Walsh v. Powers	449
		v. Walley	466, 477
		Walton v. Broadus	130
		Wambold v. Vick	265
		Wanamaker v. Weaver	75
		Wann v. People	392
		Waples v. Hastings	421
		Ward, Re	356
		v. Dulaney	18
		v. Roper	348
		v. Thompson	211
		Warde v. Warde	50, 258, 259
		Wardlaw v. Gray	408
		Wardwell v. Wardwell	307, 315
		Waring v. Waring	48
		Warlick v. White	237
		Warner v. Heiden	66
		Warren v. Jennison	214
		v. Warren	44
		Warrender v. Warrender	34
		Warwick v. Cooper	418
		Water Co. v. Ware	463
		Watkins v. De Armond	72
		Watson v. Thurber	146
		v. Warnock	322
		Watt v. Watt	209
		Watts v. Owens	287
		v. Steele	249
		v. Watts	87
		Waugh v. Emerson	486
		Waul v. Kirkman	7, 63
		Way v. Powers	489
		Waymire v. Jetmore	18
		Weaver v. Carpenter	420, 450
		v. Thornton	342
		Webber's Estate	369
		Webster v. Conley	363
		v. Hildreth	163
		v. Webster	21
		Weed v. Beebe	449
U.			
Uhl v. Commonwealth	52		
Uhrig v. Horstman	174		
Ulrich v. Ulrich	283		
Underhill v. Dennis	321		
Union Life Ins. Co. v. Hilliard	426		
United States v. Bainbridge	435		
v. Green	280		
Unity and Banking Association, Re	440		
Uransky v. Dry Dock R.	172		
V.			
Valentine v. Bell	70		
v. Canali	420		
Vanartsdalen v. Vanartsdalen	307		
Van Deusen v. Van Deusen	405		
Vandewater, Re	320, 322		
Vandyke v. Wells	157		
Vane v. Vane	284		
Van Horne, Re	403		
Van Matre v. Sankey	242		
Vason v. Bell	185, 401		
Veal v. Fortson	418		
Vidal v. Commajere	241		
Vincent v. Starks	360		
v. State	413		
v. Walker	106		
Voullaire v. Voullaire	322		
Vreeland v. Ryno	88		
Vroom v. Marsh	23		
W.			
Wade v. Cantrell	199		
v. State	413		
Wade's Succession	55		
Wagner v. Nagel	78		
Wagoner v. State	410		
Wainwright v. Wilkinson	421		
Waite v. North-Eastern R. R. Co.	442		
Wakefield v. Mackay	23		

[References are to paragraph numbers.]

Weed v. Burt	475	Willard v. Fairbanks	360
Weed Sewing Machine Co. v. Em- erson	105	v. Pinard	480
Weeks v. Merrow	252 a	v. Willard	23
v. Pacific R.	442	Williams v. Baker	107
Weems v. Bryan	99	v. Brown	420
Weir v. Marley	263	v. Carle	192
Weisker v. Lowenthal	70	v. Hugunin	151
Welch, <i>Re</i>	261	v. Jeter	465
v. Burris	353	v. Mercier	61
v. Olmstead	426	v. Moor	417
v. Welch	422	v. Prince	73
Welch's Appeal	248	v. State	23
Weld v. Walker	210	v. Walker	199
Weldon v. Little	367	v. Wilbur	160
Wellesley v. Beaufort	249	v. Williams	26, 291, 451
v. Duke of Beaufort	248, 302	Williamson v. Yager	194
v. Wellesley	258	Willis v. Fox	367
Wells v. Andrews	320	v. Snelling	90
v. Chaffin	380	v. State	410
v. Thorman	144	Wilson v. Breeding	209
Weringer, <i>Re</i>	210	v. Ford	66
Wert v. Strouse	275	v. Glossop	73
West v. Forsythe	837	v. Goit	83
v. Walker	190	v. Kohlheim	284
Westcott v. Hinckley	66	v. Life Ins. Co.	453
Westgate v. Munroe	151	v. McLaughlin	482
Whalen v. Olmstead	269	v. McMillan	265
Wheeler v. Ahrenbeak	422	v. Wilson	227, 283, 342
Wheeler Man. Co. v. Morgan	78	Wilt v. Vickers	276
Wheeling v. Trowbridge	84	Wilthaus v. Ludicus	174
Whichcote v. Lyle	414	Wilton v. Middlesex R.	271
Whipp v. State	51	Winchester v. Thayer	418
Whipple v. Giles	66	Winn v. Sprague	282
Whitaker v. Warren	272	Winstell v. Hehl	101
Whitcomb v. Barre	84	Winter v. Truax	401
White v. Bayley	467	Wiseman v. Wiseman	30
v. Bigelow	182, 188	Wiser v. Lockwood	18
v. Branch	454	Wodell v. Coggeshall	281
v. Cox	414	Wolcott v. Patterson	66, 70
v. Dance	217	Wolfe v. Howes	476
v. Henry	266	Wollaston v. Tribe	185
v. Hildreth	214	Womack v. Austin	403
v. Mann	252 a	Wood, <i>Re</i>	342
v. Murland	276	v. Adams	81
v. Ross	43	v. Black	387
v. White	26	v. Gale	351
Whitehead v. Jones	400	v. Looney	428
Wickiser v. Cook	404	v. O'Kelly	66
Widgery v. Tepper	215 a	v. Shurtleff	55
Wieman v. Anderson	174	v. Stafford	336
Wier v. Still	23	v. Terry	62, 108
Wiggins v. Keizer	293	v. Truax	452
Wilcox v. Todd	161	v. Wood	133, 136, 230
Wiley v. Gray	197	Woodbury v. Hammond	383, 393
Willie v. Brooks	454	Woodman v. Woodman	209
Wilkinson v. Black	475	Woodruff v. Bowles	103
v. Charlesworth	92	Woods v. Boots	364
		Woodward, <i>Ex parte</i>	259

## TABLE OF CASES.

xxxix

[References are to paragraph numbers.]

Woodward v. Anderson	274	Y.	
v. Barnes	68, 70	Yale v. Dederer	151, 152, 161
v. Woodward	242	Yarborough v. State	86
Woolf v. Pemberton	812	Yeager v. Knight	420
Worrell's Appeal	371	Yeager's Appeal	387
Worth v. York	132	Yeakel v. McAtee	284
Worthington v. Curtis	267	Yeatman v. Yeatman	88
Wray v. Wray	73	Yopst v. Yopst	89
Wren v. Wren	172	York v. Ferner	195
Wright v. Burrows	167	Young v. Duval	105
v. Dean	282	v. Herman	288
v. Donnell	286	v. Hicks	194
v. Haskell	477		
v. Leonard	440		
v. Robinson	362	Z.	
Wyatt v. Simpson	98	Zimmer v. Settle	228
Wyckoff v. Hulse	371	Zimmerman v. Zimmerman	283
Wynn v. Bryce	360	Zouch v. Parsons	420, 421, 438



# THE DOMESTIC RELATIONS.

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## PART I.

### INTRODUCTORY CHAPTER.

1. The law of the domestic relations is the law of the household or family, as distinguished from that of individuals in the external concerns of life. Five leading topics are embraced under this head: *First*, husband and wife. *Second*, parent and child. *Third*, guardian and ward. *Fourth*, infancy. *Fifth*, master and servant. These will be successively discussed in the present treatise.<sup>1</sup>

<sup>1</sup> § 1. Our general rule of classification is borrowed from Kent. 2 Kent, Com. Lec. 26-32. But other writers on the domestic relations have analyzed their subject differently. Blackstone omits infancy as a topic distinct from parent and child, and hence makes but four divisions. 1 Bl. Com. Lec. 14-17. The same is true of Reeve. Reeve, Dom. Rel. Since their day the topic of guardian and ward has grown into importance, giving occasion to the discussion of many principles which apply as well to parent and child, for which reason it is found better to draw off from both what is peculiar to neither, and make the new heading of infancy. Bingham, on the other hand, wrote a treatise in which the only divisions observed were those of infancy and coverture. Bing. Inf. & Cov. Fraser, who writes for readers of the civil, or rather the Scotch, law, while otherwise classifying like Blackstone, adds the relation of master and apprentice to that of master and servant (Fraser Dom. Rel. (Scotch), 2 vols.), in which respect his example is not to be imitated by common-law writers. Upon the whole, therefore, the rule of Kent seems to us the preferable one, as being concise, comprehensive, and well adapted to the present state of English and American law.

It is curious to notice that all of these writers — and there are none else of standard authority who profess to occupy the whole subject — plunge at once into the law of their leading topics with nothing by way of general introduction; nothing to indicate to the reader whither they



2. The proper limitations of our subject should be considered. As to three of our topics, — husband and wife, parent and child, and infancy, — the very names convey a distinct significance even to the mind of the unprofessional reader. Except it be in the meaning of the word “infancy,” which the law applies to all persons not arrived at majority, but popular usage restricts to the period of helplessness, all intelligent persons agree in the general use of the terms we have employed. And so strong are the moral obligations which attend marriage and the training of offspring, so intimately blended with the welfare and happiness of mankind are the ties of wife and child, that scarcely any one grows up without some knowledge of the general principles of law applicable to these topics, and particularly of such of the rights and duties as concern the person rather than the property. For positive law but enforces the mandates of the law of nature, and develops rather than creates a system.<sup>1</sup>

propose leading him. Not one has attempted to draw the chart which shall determine his legal bearings. Nor is the definition of the term “domestic relations” to be found in the books above specified. Indeed, were it not for the title-page of Reeve’s work, and a few casual passages in Kent’s Commentaries, where the same words occur, one might ask how the expression “domestic relations” crept into general use among lawyers. Blackstone uses the terms “private economical relations,” and “relations in private life;” words which of themselves would seem to give a much wider scope to our subject. 1 Bl. Com. Lec. 14. Fraser’s complete title is “personal and domestic relations.” Notwithstanding all this it is certain that “domestic relations” is now the well-sanctioned title of that law which embraces the topics specified by us at the outset, as those who examine the digests of reported cases and the codes of our leading States can testify.

<sup>1</sup> § 2. Yet even here it should be observed by the professional reader that the term “husband and wife” is acquiring at law a more limited and technical sense than formerly. The idea of marriage involves both the entrance into the relation and the relation itself; and akin to marriage celebration is the dissolution of marriage by divorce, or what we may term our recognized legal exit from the relation. Hence marriage and divorce constitute an important topic by themselves; and we find treatises which profess to deal with these alone. Marriage and divorce, moreover, have in England pertained until quite recently to the peculiar jurisdiction of ecclesiastical courts, constituting what is termed an ecclesiastical law. Buru, Eccl. Law; 1 Bishop, Mar. & Div.

As to guardian and ward the limitations of our treatise are not so easily marked out.<sup>1</sup> And with the last topic — that of master and servant — the rule of classification becomes even more uncertain.<sup>2</sup>

5th ed. §§ 48–65. The rights and duties which grow out of the marriage relation, on the other hand, still remain for separate discussion: the consequence of the celebration; the effect of marriage upon the property of each; the personal status of the parties, — in short, what new legal responsibilities are assumed, and what legal privileges are gained by the two persons who have once voluntarily united as husband and wife. It is to this latter subdivision, rather than the former, that the title of husband and wife seems at the present day to apply. We shall subordinate, then, the topics of marriage and divorce to that of the marriage status, following, in this respect, the modern legal usage; at the same time noting that, if some special term could be coined to distinguish the subdivision husband and wife from that general division which bears the same name, legal analysis would be more exact.

<sup>1</sup> In respect of the domestic relations, the guardian is a sort of temporary parent, created by the law, to supply to young children the place of a natural protector. But the term "guardian" is used rather indiscriminately in these days with reference to all who need protection at the law. Thus we have guardians of insane persons, guardians of spendthrifts, and even guardians of the poor. Blackstone treats of these last guardians under the head of public relations; and certainly they do not fall within the clear scope of private or domestic relations. Yet the legal principles applicable to one class of guardians frequently extend as well to all others. Again, a guardian's duties are chiefly with respect to property; and herein they so nearly resemble those of testamentary trustees that one frequently finds himself gliding unconsciously from the law of the family into the law of trusts.

<sup>2</sup> If servants connected with the household were alone to be considered in a treatise upon the domestic relations, the modern cases would be simple and few; but no writer has presumed to limit himself to such narrow bounds. In former centuries this relation had a marked significance. In these days we dislike to call any man master. The abolition of slavery in the United States has wellnigh removed all traces of an institution known to the ancient Roman Empire; elsewhere recognized as the common barbarian accompaniment of barbarian triumphs; and in spirit, if not in the letter, once fastened upon the common law, while the feudal system lasted. As one of the domestic relations, this topic of master and servant is of little present importance in England or America; although it has doubtless an existence to which we shall endeavor to conform. In its analogies, however, or as a relation *sub modo*, master and servant has features which the courts constantly regard. Apprentices are, without much violation of principle, included

3. The family is the earliest, the most dominating, and the most universal of all social institutions.<sup>1</sup> (1) When man united with woman, both were brought under certain restraints for their mutual well-being. Families preceded nations; and the law of the domestic relations is older than that of civil society. In fact, nations themselves are often regarded as so many families; and the very name which is placed at the head of this work, the legislator constantly applies to the public concerns of his own country as contrasted with those of foreign governments. (2) The supremacy of the law of family should not be forgotten.<sup>2</sup> Society provides the home; public policy fashions the system; and it remains for each one of us to accustom himself to rules which are, and must be, arbitrary. (3) So is the law of family universal in its adaptation. It deals directly with the individual. The ties of wife and child are for all classes and conditions; neither rank, wealth, nor social influence weighs heavily in the scales.<sup>3</sup>

under this head; they are generally bound out during minority and brought up in families. Clerks are not so readily confined within the circle of domestic relations as formerly; and the same is to be said of factors, bailiffs, and stewards. The employees of a corporation are frequently designated as servants; so are wage or salary earners generally. Our latest digests are full of the distinctions applied in determining legal liability for injuries inflicted by or upon such persons. But it cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country; that as one of the purely domestic relations it rarely attracts attention; and that in sounding its legal depths one often loses sight of his landmarks, and finds himself drifting out into the more general and appropriate subject of principal and agent.

<sup>1</sup> § 3.

<sup>2</sup> We come under the dominion of this law at the very moment of birth; we thus continue for a certain period, whether we will or no. Long after infancy has ceased, the general obligations of parent and child may continue; for these last through life. Again, we subject ourselves by marriage to a law of family; this time to find our responsibilities still further enlarged. And although the voluntary act of two parties brings them within the law, they cannot voluntarily retreat when so minded. To an unusual extent, therefore, is the law of family above, and independent of, the individual. § 3.

<sup>3</sup> To every one public law assigns a home or domicile; and this domicile determines not only the status, capacities, and rights of the person,

**4. The law of husband and wife is now in a transition state,** both in England and the United States; and so unsettled and discordant are its principles at the present time, with reference to the rights and obligations of the married pair, that the writer has felt constrained to depart somewhat from the usual plan of law treatises, adopting what might be termed a consecutive or historical arrangement of his materials; since otherwise the subject would furnish to the reader's mind little else than a series of unreconciled contradictions.<sup>1</sup> This confused state of the law of husband and wife is exhibited in a contest still going on between two opposing schemes for adjusting the property rights of the married parties. The one is the common-law scheme; the other resembles that of the civil law. The former is at the basis of our jurisprudence, English and American. The latter has had a powerful influence in modern times, moulding the doctrines of the equity tribunals and shaping our local legislation during the past fifty years. Let us examine these schemes separately, and afterwards a third or intermediate scheme, known as that of community.

**5. (1) The common-law scheme makes unity in the marriage relation its cardinal point.** But to secure this unity the law starts with the assumption that the wife's legal existence becomes suspended or extinguished during the marriage state; it sacrifices her property interests, and places her

but also his title to personal property. There is the political domicile, which limits the exercise of political rights. There is the forensic domicile, upon which is founded the jurisdiction of the courts. There is the civil domicile, which is acquired by residence and continuance in a certain place. The place of birth determines the domicile in the first instance; and one continues until another is properly chosen. The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature. § 3.

<sup>1</sup> § 4. No one can gain an intelligent comprehension of the rights and disabilities of the marriage union as they exist to-day, without examining: (1) The old common-law or coverture doctrine which is at the base of our English-American system; (2) the modification of that doctrine by equity and modern legislation in the jurisdiction; (3) the latest local statute (judicially construed or not) which bears upon the particular point.

almost absolutely within her husband's keeping, so far as her civil rights are concerned. Her fortunes pass by marriage into her husband's hands, for temporary or permanent enjoyment, as the case may be; she cannot earn for herself, nor, in general, contract, sue, or be sued in her own right; and this, because she is not, in legal contemplation, a distinct person. The husband loses little or nothing of his own independence by marriage; but in order to distribute the matrimonial burdens with some approach to equality, the law compels him to pay debts on his wife's account, which he never in fact contracted, not only where she is held to be his agent by legal implication, but whenever it happens that she has brought him by marriage outstanding debts without the corresponding means of paying them. Husband and wife take certain interests in one another's lands, such as curtesy and dower, which become consummate upon survivorship. In general, their property rights are summarily adjusted by the law with reference rather to precision than principle. On the whole, however, the advantages are with the husband; and he is permitted to lord it over the wife with a somewhat despotic sway; as the old title of this subject — *baron and feme* — plainly indicates. The witty observation is not wholly inappropriate, that, in the eye of the common law, husband and wife are one person, and that one is the husband.<sup>1</sup>

6. (2) The civil-law scheme pays little regard to the theoretic unity of a married pair. It looks rather to the personal independence of both husband and wife. Each is to be protected in the enjoyment of property rights. In the most polished ages of Roman jurisprudence we find, therefore, that husband and wife were regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates. The wife was comparatively free from all civil disabilities. She was alone responsible for her own debts; she was competent to sue and be sued on her own contracts; nor could the husband subject her or her property

<sup>1</sup> § 5. See *post*, Part II., as to coverture doctrine.

to any liability for his debts or engagements.<sup>1</sup> But the civil law allowed agreements to be made by which these rights

<sup>1</sup> § 6. 1 Burge, Col. & For. Laws, 202, 263.

In the earlier period of Roman law the marital power of the husband was as absolute as the *patria potestas*. But before the time of the Emperor Justinian it had assumed the aspect already noticed; in which it is to be distinguished from all other codes. The *communio bonorum*, which is to be found in so many modern systems of jurisprudence whose basis is the Roman law, treats the wife's separate property and separate rights as exceptional. The peculiarities of the civil law in this respect may, perhaps, be referred to the disuse into which formal rites of marriage had fallen. Formal marriage gave to husband and wife a community of interest in each other's property. But marriage *per usum*, or by cohabitation as man and wife, which became universally prevalent in later times, did not alter the status of the female; she still remained subject to her father's power. Hence parties united in a marriage *per usum* acquired no general interest in one another's property, but only an incidental interest in certain parts of it. The wife brought her *dos*; the husband his *anti-dos*; in all other property each retained the rights of owner unaffected by their relation of husband and wife. The *dos* and *anti-dos* were somewhat in the nature of mutual gifts in consideration of marriage. Every species of property which might be subsequently acquired, as well as that owned at the time of marriage, could be the subject of dotal gift. The father, or other paternal ancestor of the bride, was bound to furnish the *dos*, and the husband could compel them afterwards, if they failed to do so; the amount of value being regulated according to the means of the ancestor and the dignity of the husband. This pecuniary consideration appears to have influenced the later marriages to a very considerable extent. And while the husband had no concern with the wife's extra-dotal property, — since this she could manage and alienate free from all control or interference, — over her dotal property he acquired a dominion which was determinable on the dissolution of the marriage, unless he had become the purchaser at an estimated value. As incidental to this dominion he had the usufruct to himself, he might sue his wife or any one else who obstructed his free enjoyment, and he could alienate the personal property at pleasure. But he could not charge the real estate unless a purchaser; and upon his death the wife's dotal property belonged to her, or, if she had not been emancipated, to her father; and to secure its restitution after the dissolution of marriage, the wife had a tacit lien upon her husband's property. Of the *anti-dos*, or *donatio propter nuptias*, not so much is known; but this appears to have generally corresponded with the *dos*; it was restored by the wife upon the dissolution of marriage, and was regarded as her usufructuary property in like manner. It was not necessarily of the same value or amount with the wife's *dos*. Over his general property the husband retained the sole and absolute power of

might be regulated and varied at pleasure. And by their stipulations the married parties might so enlarge their respective interests as to provide for rights to the survivor.<sup>1</sup> These agreements were not unlike the antenuptial settlements so well known to our modern equity courts, which we shall consider in due course hereafter.

7. (3) The community system relates to marital property, in which respect it occupies an intermediate position between the civil and common-law schemes. The *communio bonorum* may have been part of the Roman law at an earlier period of its history, but it had ceased to exist long before the compilation of the Digest; though parties might by their nuptial agreement adopt it.<sup>2</sup> This constitutes so prominent a feature of the codes of France, Spain, and other countries of modern Europe, whence it has likewise found its way to Louisiana, Florida, Texas, California, and other adjacent States, once subject to French and Spanish dominion, and erected, in fact, out of territory acquired during the present century upon the Mississippi, the Gulf of Mexico, and the Pacific Ocean, that it deserves a brief notice.<sup>3</sup> On the whole, there

alienation, and his wife had no interest in it, nor could she interfere with his right of management. § 6; 1 Burge, Col. & For. Laws, 202; *Ib.* 263 *et seq.*

<sup>1</sup> § 6; 1 Burge, Col. & For. Laws, 273.

<sup>2</sup> 1 Burge, Col. & For. Laws, 202; *Ib.* 263 *et seq.*

<sup>3</sup> § 7. The relation of husband and wife is regarded by these codes as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of debts. This partnership or community applies to all property acquired during marriage; and it is the well-settled rule that the debts of the partnership have priority of claim to satisfaction out of the community estate. Sometimes the community is universal, comprising not only property acquired during coverture, but all which belonged to the husband and wife before or at their marriage. 1 Burge, Col. & For. Laws, 277 *et seq.* It is evident, therefore, that the provisions of such codes may differ widely in different States or countries. The principle which distinguishes the community from both the civil and common-law schemes is, however, clear; namely, that husband and wife should, presumedly at least, have no property apart from one another.

Under modern European codes this law of community embraces profits, income, earnings, and all property which, from its nature and the inter-

is in the doctrine of community much that is fair and reasonable; but in the practical workings of this system it is found

est of the owner, is the subject of his uncontrolled and absolute alienation; but certain gifts made between husband and wife in contemplation of marriage are of course properly excluded. 1 Burge, Col. & For. Laws, 281, 282. By the French law only the personal estate entered into the community; but the Spanish law included both real and personal estate. *Childress v. Cutter*, 16 Mo. 24. Whether antenuptial debts are to be paid from the common property, as well as debts contracted while the relation of husband and wife continues, would seem to depend upon the extent of the *communio bonorum*, as including property brought by each as capital stock to the marriage, or only such property as they acquire afterwards. 1 Burge, 294. The codes of modern Europe recognize no general capacity of the wife to contract, sue, and be sued, as at the later civil law. On the contrary, the husband becomes, by his marriage, the curator of his wife. He has, therefore, the sole administration and management of her property, and that of the community; and she is entirely excluded in every case in which her acts cannot be referred to an authority, express or implied, from her husband. *Ib.* 296, 301. Hence, too, all debts and charges are incurred by the husband. The community ceases on the termination of marriage by mutual separation or the death of either spouse. *Ib.* 303, 305. And the various codes provide for the rights of the survivor on the legal dissolution of the community by death.

The reader may readily trace the influence of the community system upon the jurisprudence of Louisiana and the other States to which we have referred, whose annexation was subsequent to the adoption of our Federal Constitution, by examining their judicial reports. The Civil Code of Louisiana, as amended and promulgated in 1824, pronounced that the partnership or community of *acquêts* or gains arising during coverture should exist in every marriage where there was no stipulation to the contrary. This was a legal consequence of marriage under the Spanish law. Art. 2312, 2369, 2370; 2 Kent, Com. 183, *n.* The statutes of Texas, Florida, Missouri, California, and other neighboring States, are characterized by similar features. But all of these laws have been modified by settlers bringing with them the principles of the common law. So, too, the doctrines of separate estate, revived in modern jurisprudence, are introduced into the legislation of these as other American States. Texas Digest, Paschal, "Marital Rights;" Cal. Civil Code, "Husband and Wife;" Parker's Cal. Dig. "Husband and Wife;" *Walker v. Howard*, 34 Tex. 478; *Caulk v. Picon*, 23 La. Ann. 277. And see *Forbes v. Moore*, 32 Tex. 195. The American community doctrine, as we may term it, is that all property purchased or acquired during marriage, by or in the name of either husband or wife, or both, including the produce of reciprocal industry and labor, and the income of such property shall be deemed to belong *prima facie* to the community, and be held liable for the community marriage debts accordingly. Louisiana



rather complicated and perplexing, and hence unsatisfactory; while in no part of the United States can it be said to exist at this day in full force, since husband and wife are left pretty free to contract for the separate enjoyment of property, and so exclude the legal presumption of community alto-

Civil Code, §§ 2369-2372; 29 La. Ann. 520; *Tally v. Heffner*, 29 La. Ann. 583; 107 La. 456. Land owned by a spouse at the time of marriage does not fall into the community. *Lake v. Lake*, 52 Cal. 428; 47 Cal. 62; 60 S. W. 997. *Aliter* as to land conveyed to one or the other during marriage. 23 Wash. 132. See 139 Cal. 559. The wife's earnings, unless given her by the husband, and likewise property bought with such earnings, must belong to the community. *Johnson v. Burford*, 39 Tex. 242; *Ford v. Brooks*, 35 La. Ann. 157; 107 La. 456; 57 P. 800. But see 43 Tex. 340. So with money obtained as damage for an injury. (Tex.) 56 S. W. 959. The husband, as head and master of the community, has the right to dispose of its movable effects. 34 La. Ann. 858. But it will be perceived that, in our American codes, community, as an incident to marriage property, is only a presumption, which may be overcome in any instance by clear proof that the property was acquired as the separate estate of either the husband or wife. (Tex.) 49 S. W. 1033; 142 Cal. 1; 66 P. 539. This community rule, moreover, as it is evident, does not apply to the property which either husband or wife brought into the marriage; such property, by the codes, being distinctly kept to each spouse apart as his or her separate property. La. Code, §§ 2316, 2369, 2371; 30 La. Ann. 167; *McAfee v. Robertson*, 43 Tex. 591; *Hanrick v. Patrick*, 119 U. S. 156; *Myrick's Prob.* 93; 49 Tex. 49.

Community creditors take priority over the individual creditors of either spouse in community property. 107 La. 270. And, besides, it is now usually provided by legislation that property acquired during marriage, "by gift, bequest, devise, or descent," with the rents, issues, and profits thereof, shall be separate, not common property. See 132 Cal. 320. The tendency, then, in our States, where the law of community still exists — though all have not proceeded in legislation to the same length — is to limit rather than extend its application. The wife has a tacit mortgage for her separate property, so far as the law may have placed it in her husband's control; also upon the community property from the time it went into his hands; and, moreover, she may, on surviving her husband, renounce the partnership or community, in which case she takes back all her effects, whether dotal, extra-dotal, hereditary, or proper. *Schouler, Hus. & Wife*, §§ 341, 342. And see *ib.* §§ 343, 344, as to the wife's separate property under these codes; viz., dotal and extra-dotal or paraphernal. The status of a married woman under the Louisiana Code, with reference to the husband's liability for her paraphernal property, is discussed by Mr. Justice Gray in *Fleitas v. Richardson*, 147 U. S. 550.

gether; and, moreover, the constant tendency of our South-western States is to remodel their institutions upon the Anglo-American basis, common to the original States and those of the Ohio valley, though the civil idea of a basic exposition by code remains fundamental.<sup>1</sup>

8. What are familiarly known as the "married women's acts," the product for the most part of our American legislation since 1848, and more recently engrafted upon the code of Great Britain, aim to secure to the wife the independent control of her own property, and the right to contract, sue, and be sued, without her husband, under reasonable limitations. These acts, therefore, substitute in a great measure the civil for the common law. It may be laid down that the common law, in denying to the wife the rights of ownership in property acquired by gift, purchase, bequest, or otherwise, did her injustice, and that a radical change became necessary; and this is shown, not only in the legislation thus worked out in so many independent jurisdictions, but by the fact that the equity tribunals had gradually moulded the unwritten law so as to secure results previously in the same direction. All this separate property legislation, as well as the equity doctrines pertaining to the subject in England and the several United States, will be duly set forth in these pages hereafter, so far as the chaotic condition of the law at this transition period will permit.<sup>2</sup> And the modification of the respective property rights of a married pair by marriage contracts or settlements will also be considered.<sup>3</sup>

<sup>1</sup> See *Packard v. Arellanes*, 17 Cal. 525; *Waul v. Kirkman*, 25 Miss. 609; *Succession of McLean*, 12 La. Ann. 222; *Jones v. Jones*, 15 Tex. 143; *Ex parte Melbourn*, L. R. 6 Ch. 64; La. Civil Code, §§ 2369-2405; 1 Burge, Col. & For. Laws, 277 *et seq.*, where the law of community as it stood about half a century ago is fully set forth; the learned note to 2 Kent, Com. 183; Stimson, Am. Stat. Law, § 6434. See also Schouler, Hus. & Wife, §§ 335-345. And see § 7.

<sup>2</sup> See coverture doctrine, modified by equity and modern statutes, Part II., *post*.

<sup>3</sup> Marriage Settlements, *post*. See § 8.

In the connubial joys to which every age and nation bear witness, the vast majority of this globe's inhabitants must have participated from one

9. In fine, marriage is a relation divinely instituted for the mutual comfort, well-being, and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race. Its application to society being universal, the fundamental rights and duties involved in this relation are recognized by something akin to instinct, and often designated by that name, so as to require by no means an intellectual insight; intellect, in fact, impairing often that devotedness of affection which is the essential ingredient and charm of the relation. Indeed, even the rudest savages understand how to bear and bring up healthy offspring, and are found defending and protecting their families. Legal and political systems are accretions based upon marriage and property; but in the family rather than individualism we find the incentive to accumulation, and in the home the primary school of the virtues, private and public. At the same time marriage affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints; woman's condition becomes necessarily one of comparative subjection; man is tamed by her gentleness and the helplessness of tender off-

era to another, with a certain voluntary adjustment of the reciprocal burdens, such as relieved both husband and wife of a sense of bondage to one another. And thus have the inequalities, the hardships of marriage codes, proved less in practice than in literal expression. For whatever the apparent severity of the law, human nature or love's divine instinct works in one uniform direction, — namely, towards uniting the souls once brought into the arcana of married life in an equally honorable companionship. Woman's weakness has been her strongest weapon; where her influence could not overflow, it permeated; and if her life has been, legally speaking, at her husband's mercy, her constant study to please has kept him generally merciful. She has not been superior to her race and epoch, but on the whole as well protected, as well advanced, in her day, as those of the other sex. Except for this, the wife's lot must have been miserable indeed, even under the most civilized institutions ever established. Codes and the experience of nations in this respect show strange inconsistencies: laws at one time degrading to woman, and yet marital happiness; laws at another elevating her independence to the utmost, and yet marital infelicities, lust, and bestiality. § 9.

See examination of ancient marriage systems, including that of the Roman Republic, in Schouler's *Hus. & Wife*, §§ 4-6.

spring, and for their sake he puts a check upon his baser appetites, and concentrates his affection upon the home he has founded. Such is the conjugal union in what we may term a state of nature. And now, while man frames the laws of that union, as he always does in primitive society, he regards himself as the rightful head of the family and lord of his spouse; and, somewhat indulgent of his own errant passions, he makes the chastity of his wife the one indispensable condition of their joint companionship. She, on her part, more easily chaste than himself, views with pain whatever embraces he may bestow upon others of her sex. Her personal influence over him, always strong, enlarges its scope as the State advances in arts and refinement, until at length woman, as the maiden, the wife, and the matron, becomes intellectually cultivated, a recognized social power in the community. Yearning now for a wider influence and equal conditions, her attention, strongly concentrated upon the marriage relation, seeks to make the marriage terms more equal: first, she desires her property secured to her own use, whether married or single, and, indignant at the inadequate remedies afforded under the law for wifely wrongs, demands the right of dismissing an unworthy husband at pleasure; moreover, as a mother, she claims that the children shall be hers hardly less than the father's. These first inroads are easily made; for what she demands is theoretically just. But just at this point the peril of female influence is developed. Woman rarely comprehends the violence of man's unbridled appetite, or perceives clearly that, after all, in the moral purity and sweetness of her own sex, such as excites man's devotion and makes home attractive, is the fundamental safeguard of life and her own most powerful lever in society, besides the surest means of keeping men themselves continent. She forgets, too, that, to protect that purity and maintain her moral elevation, a certain seclusion is needful; which seclusion is highly favorable to those domestic duties which nature assigns her as her own. More is granted woman. The bond of marriage being loosened, posterity degenerates, society goes headlong; and the flood-gates of licentiousness once

fully opened, the hand must be strong that can close them again.<sup>1</sup>

10. Of the remaining topics to be discussed, little need be said by way of general preface. These have felt the softening influences of modern civilization. The common-law doctrine of Parent and Child finds its most important modifications in the gradual admission of the mother to something like an equal share of parental authority; in the growth of popular systems of education for the young; in the enlarged opportunities of earning a livelihood afforded to the children of idle and dissolute parents; and in the lessened misfortunes of bastard offspring. Guardian and Ward, a relation of little importance up to Blackstone's day, has rapidly developed since into a permanent and well-regulated system under the supervision of the chancery courts, and, in this country, of the tribunals also with probate jurisdiction; and much of the old learning on this branch of the law has become rubbish for the antiquary. The law of Infancy remains comparatively unchanged; but of young children it may generally be said that the infant's real welfare has become of paramount consideration, where custody is to be awarded. Of Master and Servant, we have spoken.<sup>2</sup>

<sup>1</sup> Happiness, we may admit, differs with the capacity, like the great and small glass equally full which Dr. Johnson mentions. Yet marriage is suited to all capacities; it is meant for the million and not for some privileged class; and men and women are the complement of one another in all ages, neither being greatly the intellectual superior of the other at any epoch, but the man always having necessarily the advantage in physical strength and the power to rule. The best-ordered marriage union for any community is that in which each sex accepts its natural place, where woman is neither the slave nor the rival of man, but his intelligent helpmate; where a sound progeny is brought up under healthy home influences. The worst is that where conjugal and parental affection fail, and all is discord and unrest, a sea without a safe harbor. To the household, stability may prove more essential than freedom, and woman's status more dignified or more degraded, as the case may be, than the law assumes to fix it. Under all circumstances, moreover, the physical superiority of the male companion, and his propensity to self-indulgence, are forces which woman will always have to reckon with. § 10.

<sup>2</sup> § 11.

## PART II.

### HUSBAND AND WIFE.

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#### CHAPTER I.

##### MARRIAGE.

11. The word "marriage" signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself.<sup>1</sup>

12. That marriage is a civil contract, and nothing more, has been frequently said in the courts of this country. That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound, they are bound forever. Mutual consent, as in all contracts, brings them together; but mutual consent cannot part them. Death alone dissolves the tie, — unless the legislature, in the

<sup>1</sup> § 12. See Stimson, Am. Stat. Law, § 6100.

exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce; and this it should do only when the grossly immoral conduct of one contracting party brings unmerited shame upon the other, disgraces an innocent offspring, and inflicts a wound upon the community. So in other respects the law of marriage differs from that of ordinary contracts. For, as concerns the parties themselves, mental capacity is not the only test of fitness, but physical capacity likewise, — a new element for consideration, no less important than the other. Again, the encumbrance of an existing union operates here as a special disqualification. Blood relationship is another. It is an individual contract and agency cannot apply. So, too, an infant's capacity is treated on peculiar principles, as far as the marriage contract is concerned; for he can marry young and be bound by his marriage. Third parties cannot attack a marriage and have it nullified because of its injury to their own interests. International law relaxes its usual requirements in favor of marriage. And finally the formal celebration now commonly prevalent, both in England and America, is something peculiar to the marriage contract; and in its performance we see but the faintest analogy to the execution and delivery of a sealed instrument.<sup>1</sup>

<sup>1</sup> § 13.

The earnestness with which so many of our American progenitors insisted upon the contract view of marriage may be ascribed in part to their hatred of the Papacy and ritualism, and their determination to escape the Roman Catholic conclusion that marriage was a sacrament. By no people have the marriage vows been more sacredly performed than by ours down to a period, at all events, comparatively recent. That a State legislature is not precluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligation of contracts, or interfering with private rights and immunities, has been frequently asserted. *Maguire v. Maguire*, 7 Dana (Ky.), 181; *Green v. State*, 58 Ala. 190; 3 Tex. App. 263; *Rugh v. Ottenheimer*, 6 Oreg. 231; *Adams v. Palmer*, 51 Me. 480; 84 Mo. App. 332. And as to the private regulation of their property rights, by the contract of parties to a marriage, that, of course, is to be distinguished from their marriage, which may take place without any property regulation whatever. *Lord Stowell*, in *Lindo v. Belisario*, 1 Hag. Con. 216. § 14.

13. We are, then, to consider marriage, not as a contract in the ordinary acceptation of the term, but as a contract *sui generis*, if indeed it be a contract at all, — as an agreement to enter into a solemn relation which imposes its own terms, and as an agreement, moreover, peculiarly individual and not representative. On the one hand discarding church dogmas by which marriage is elevated to the character of a sacrament, on the other we repudiate that dry definition with which the lawgiver sometimes seeks to impose upon the natural instincts of mankind.<sup>1</sup>

14. Between void and voidable marriages a distinction is made at law. This distinction, which appears to have originated in a conflict between the English ecclesiastical and common-law courts, was first announced in a statute passed during the reign of Henry VIII.; and it is also to be found in succeeding marriage and divorce acts down to the present day. The distinction of void and voidable applies, not to the legal consequences of an imperfect marriage, once formally dissolved, but to the status of the parties and their offspring before such dissolution. A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until, at all events, a competent tribunal has

<sup>1</sup> Duntze v. Levett, Ferg. 68, 385, 397; 3 Eng. Ec. 360, 495, 502.

A church decree cannot dissolve a marriage, though made by a member contrary to its own rules. 20 C. S. 338; 25 Utah, 129.

We adopt such views as the distinguished Lord Robertson held. And Judge Story observes of marriage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts." Story, Conf. Laws, § 108, n. So Fraser, while defining marriage as a contract, adds in forcible language: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." 1 Fraser, Dom. Rel. 87. And see 1 Bishop, Mar. & Div. 5th ed. § 18, which ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordi-



pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside.<sup>1</sup> One feature in much of our modern marital legislation is the increasing favor shown to innocent parties who were misled; where the man or the woman or both of them acted in good faith, civil as well as criminal consequences are guarded against; and children innocently begotten before the disability was discovered in fact, are treated as legitimate offspring.<sup>2</sup>

15. The essentials of marriage are now to be considered. It may be stated generally that, in order to constitute a perfect matrimonial union, the contracting parties should be two persons of the opposite sexes, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them nary contracts to the marriage relation. Also see 1 Yerg. (Tenn.) 110, per Catron, J.; 4 R. I. 87; § 13.

<sup>1</sup> 1 St. 32 Hen. VIII. c. 38. See 1 Bishop, Mar. & Div. § 108 *et seq.*

<sup>2</sup> See *e. g.* the "Enoch Arden" statutes cited in Stimson's Am. Stat. Law, § 6116. Formerly, the effect of a voidable marriage once avoided was disastrous; but the curative policy of our later legislature is more humane towards the innocent thereby involved. § 14. No annulment without due notice to the other spouse. 97 Me. 130.

Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage; and also where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity; and such sentences have now in general a prospective force only, in order that rights already vested may remain unimpaired, and, still more, that children may not suffer for the follies of their parents. § 14. See *post* as to consanguinity, impotence, or physical incapacity; 97 Me. 130. The local statute should be consulted on such a point. Stimson's Am. Stat. Law, §§ 6111-6116. As for availing one's self of a voidable marriage as well as in divorce, it may be asserted as a general maxim that the party should be prompt to act when he has his right and knows it, and that he should also seek to enforce his rights with good faith and honor on his own part. Affirmance, condonation, connivance, are excuses suggested to a defending party; and recrimination is common in divorce libels. See Divorce, *post*. Whenever or wherever an innocent party finds one's self entrapped into a void or voidable marriage, cohabitation should cease and the separation should be instant and absolute.

being bound by a previous nuptial tie, neither of them withholding a free assent; and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law. These are the essentials of marriage. Hence we are to treat of the following topics: (1) the disqualification of blood; (2) the disqualification of civil condition; (3) mental capacity; (4) physical capacity; (5) the disqualification of infancy, which in reality is based upon united considerations of mental and physical unfitness; (6) prior marriage undissolved; (7) force, fraud, and error; (8) the formal celebration of a marriage; under which last head may be also included the consent of parents or guardians, not to be deemed indispensable, except in conformity with the requirements of a marriage celebration statute. These essentials all have reference solely to the time, place, and circumstances of entering into the marriage relation, and not to any subsequent incapacity of either party.

16. (1) *As to the disqualification of blood.*<sup>1</sup> The difficulty is, not in discovering that there is some prohibition by God's law, but in ascertaining how far that prohibition extends. This difficulty is manifested in our language by the use of two terms, — "consanguinity" and "affinity;" one of which covers the *terra firma* of incestuous marriages, the other offers debatable ground. The disqualification of consanguinity applies to marriages between blood relations in the lineal, or ascending and descending lines.<sup>2</sup> Under Stat. Hen. VIII.,

<sup>1</sup> On no point have writers of all ages and countries been more united than in the conviction that nature abhors, as vile and unclean, all sexual intercourse between persons of near relationship. But on few subjects have they differed more widely than in the application of this conviction. Among Eastern nations, since the days of the patriarchs, practices have prevailed which to Christian nations and in days of civilized refinement seem shocking and strange. § 16.

<sup>2</sup> There can be but one opinion concerning the union of relations as near as brother and sister. The limit of prohibition among remote collateral kindred has, however, been differently assigned in different countries. The English canonical rule is that of the Jewish law which protested against the promiscuous practices of other primitive peoples. The Greeks and Romans recognized like principles, though with various modifications and alterations of opinion. But the Church of the Middle

which limits the prohibition in England, the impediment has been treated as applicable to the whole ascending and descending line, and further, as extending to the third degree of the civil reckoning inclusive; or in other words, so as to prohibit all marriages nearer than first cousins.<sup>1</sup> But the English law goes even further, and places affinity on the same footing as consanguinity as an impediment. Affinity is the relationship which arises from marriage between a husband and his wife's kindred, and *vice versa*. It is shown that while the marriage of persons allied by blood produces

Ages found in the institution of marriage, once placed among the sacraments, a most powerful lever of social influence. The English ecclesiastical courts made use of this disqualification, extending it to the seventh degree of canonical reckoning in some cases, and beyond all reasonable bounds. In some Roman Catholic countries — *e. g.* Portugal — the marriage of first cousins is still pronounced incestuous. See *Sottomayor v. De Barros*, L. R. 2 P. D. 81; L. R. 3 P. D. 1.

<sup>1</sup> § 16. See Stat. 32 Hen. VIII. c. 38. According to Archbishop Parker's table of degrees (1563),—

*A man may not marry his*

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Step-mother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.

*A woman may not marry her*

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.
6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Step-father.
12. Husband's father.
13. Son.
14. Husband's son.

The statute prohibition includes legitimate as well as illegitimate children, and half-blood kindred equally with those of the whole blood. 1 Bishop, Mar. & Div. 5th ed. §§ 315, 317; 1 B. & S. 447. Its principles have been recognized in the United States. Marriage between an uncle and niece of full blood, or between an aunt and nephew, has been treated as incestuous in various jurisdictions. *Harrison v. State*, 22 Md. 468; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551; 22 Ky. Law Rep. 942. And there are a few States which forbid the marriage of persons more nearly related than second cousins. See Stimson, Am. Stat. Law, § 6111; § 16.

offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recognized as an impediment, but not affinity. The worst that can probably be said of the latter is, that it leads to a confusion of domestic rights and duties.<sup>1</sup> Marriages within the forbidden degrees of consanguinity are by modern statutes made null and void, and the offending parties are liable to imprisonment if aware of the relationship. But with regard to marriages among relatives purely by affinity, the rule in America is not so stringent as in England.<sup>2</sup>

17. (2) *As to the disqualification of civil condition.* Race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England.<sup>3</sup> As to persons formerly slaves in this country, there are acts of Congress which legitimate their past cohabitation, and enable them to drop the fetters of concubinage. And the manifest tendency of the day, here as abroad, is towards removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature.<sup>4</sup>

<sup>1</sup> No question has been discussed with more earnestness in both England and America, with less positive result, than one which turns upon this very distinction in a collateral application; namely, whether a man may marry his deceased wife's sister. This question has received a favorable response in Vermont. *Blodget v. Brinsmaid*, 9 Vt. 27, per Collamer, J. "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister." But in England such marriages are still deemed incestuous, and within the prohibition of God's law; and the House of Lords resists all legislative change in this respect. 11 Q. B. 173; *Ex parte Naden*, L. R. 9 Ch. 670. See 2 Barb. Ch. (N. Y.) 331; 2 Leigh (Va.), 717.

<sup>2</sup> § 16; Stimson, § 6111. See local statute on such points. Some marriages of affinity are prohibited by a local statute, and yet not made void. 45 N. J. Eq. 485. If voidable, and yet by decree avoided as *ab initio*, the consequences must be disastrous. See 14.

<sup>3</sup> § 17; 1 Bishop, §§ 308-311.

<sup>4</sup> § 17; Act July 25, 1866, c. 240; 15th Amendment U. S. Const.;

But the race barrier has a strong foundation in human nature, wherever marriage companionship is concerned.<sup>1</sup>

18. (3) *As to mental capacity.* No one can contract a valid marriage unless capable, at the time, of giving an intelligent consent. Hence the marriages of idiots, lunatics, and all others who have not the use of their understanding at the time of the union are now treated as null; though the rule was formerly otherwise, from perhaps a too great regard to the sanctity of the institution in the English ecclesiastical courts.<sup>2</sup> What degree of insanity will amount to disqualification is not easily determined; so varied are the manifestations of mental disorder at the present day, and so gradually does mere feebleness of intellect shade off into hopeless idiocy. Certain is it that a person may enter into a valid marriage, notwithstanding he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament, provided he displays soundness in other respects and can manage his own affairs with ordinary prudence and skill.<sup>3</sup>

*Stewart v. Munchandler*, 2 Bush (Ky.), 278; *State v. Harris*, 63 N. C. 1. For southern statutes which now legalize the marriages of former slaves, &c., see *Schouler, Hus. & Wife*, § 16; also 80 Va. 563; 67 Ga. 260; 69 Ala. 281; 87 N. C. 329; 10 Lea, 652.

As to statutes formerly forbidding marriage between a Roman Catholic and Protestant, see *Commonwealth v. Kenney*, 120 Mass. 387; 10 Phila. 176. The statute 19 Geo. II. ch. 13, to this effect, has partial reference to the solemnization of marriage by a Popish priest. These are disabilities imposed by a Protestant Parliament, it is worth observing.

<sup>1</sup> Marriage between negroes (or Indians) and whites, is still forbidden in many of the United States, those in particular where negroes chiefly dwell; while in Oregon and some other Pacific States similar prohibitions of white and Chinese marriages are found. *Stimson*, § 6112; 80 Mo. 175.

<sup>2</sup> See Lord Stowell in 1 Hag. Con. 414; *Stimson*, Am. Stat. Law, § 6112; § 18.

<sup>3</sup> § 18; 2 Kent, Com. 76; 2 Phillim. 69; 1 Bishop, §§ 124-142; 1 Bl. Com. 438, 439.

Every case stands on its own merits; but the usual test applied in the courts is that of fitness for the general transactions of life; for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage. 3 Curt. Ec. 671; 4 Pick. (Mass.) 32; *Cole v. Cole*, 5 Sneed (Tenn.). 57; *Atkinson v. Medford*, 46 Me. 510; *Ward v. Dulaney*, 23 Miss. 410; *McElroy's Case*, 6 W. & S. (Penn.) 451. This test is sufficiently precise for most purposes. Yet we apprehend the real issue is whether

Marriage contracted during a lucid interval is at law deemed valid.<sup>1</sup> On the other hand, marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void,<sup>2</sup> as of course would be any marriage contracted by one at the time permanently insane.<sup>3</sup> Suits of nullity, brought to ascertain the facts of insanity, are favored by law both in England and America; and modern legislation discourages all collateral disputes involving questions so painful and per-

one is capable of entering understandingly into the relation of marriage. There are two questions, however: first, whether the party understands the marriage contract; second, whether he is fit to perform understandingly the momentous obligations which that contract imposes; and both elements might well enter into the consideration of each case. "If any contract more than another," observes Lord Penzance in a recent English case, "is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, — an act by which the parties bind their property and their persons for the rest of their lives." *Hancock v. Peaty*, L. R. 1 P. & D. 335, 341. Evidence of one's mental condition before and after the marriage is admissible. *St. George v. Biddeford*, 76 Me. 593; *Durham v. Durham*, 10 P. D. 80.

<sup>1</sup> 1 Bishop, § 130; *Banker v. Banker*, 63 N. Y. 409; *Smith v. Smith*, 47 Miss. 211. But see local statute as to one under guardianship, § 18.

<sup>2</sup> *Parker v. Parker*, 6 Eng. Ec. 165.

<sup>3</sup> Lord Penzance in L. R. 1 P. & D. 335; *Banker v. Banker*, 63 N. Y. 409; 1 Bishop, § 130; *Smith v. Smith*, 47 Miss. 211. Cf. *Waymire v. Jetmore*, 22 Ohio St. 271. And as to development of the malady about the time of the ceremony, see *Schouler, Hus. & Wife*, § 19. See also § 19.

Upon the principle of temporary insanity, drunkenness incapacitates, if carried to the excess of *delirium tremens*; though not, it would appear, if the party intoxicated retains sufficient reason to know what he is doing. *Clement v. Mattison*, 3 Rich. (S. C.) 93; *Gore v. Gibson*, 13 M. & W. 623; 3 Camp. 33; *Scott v. Paquet*, L. R. 1 P. C. 552; 203 Ill. 543. Drunkenness was formerly held a bad plea, for the common law permitted no one to stultify himself; but the modern rule is more reasonable. See *Gillett v. Gillett*, 78 Mich. 184. Deaf and dumb persons were formerly classed as idiots; this notion, however, is exploded. They may now contract marriage by signs. 1 Bishop, § 133; 1 Fraser, Dom. Rel. 48; 1 Kay & Johns. 4; § 18. Total blindness or mere deafness, of course, constitutes no incapacity. In general, we may add that the disqualification of insanity is often considered in connection with fraud or undue influence exercised by or on behalf of the other contracting party, over a weak intellect, for the sake of a fortune, a title, or some other worldly advantage. § 18.

plexing.<sup>1</sup> In many States this is now the only course to be pursued, such marriages being treated as voidable and not void.<sup>2</sup> The issue in all such cases is, mental condition at the very time of the marriage.<sup>3</sup>

19. (4) The question of physical capacity involves an investigation of facts even more painful and humiliating than that of mental capacity. Yet as marriage is instituted, in part at least, for the indulgence of natural cravings and with a view to propagate the human family, sound morality demands that the proper means shall not be wanting; that, at all events, the sexual desire may be fully gratified. Where impotence exists, therefore, there can be no valid marriage. By this is meant simply that the sexual organization of both parties shall be complete. But mere barrenness or incapacity of conception constitutes no legal incapacity in England and the United States, nor can a physical defect which does not interfere with copulation; nor indeed any disability which is curable, even though not actually cured, unless the party disabled unreasonably refuses to submit to the proper remedies, and so is placed clearly in the wrong.<sup>4</sup> It is capacity for fulfilling the conditions of copulation, and not of procreation, that our law regards; and with the rapid progress of medical science during the present century, cases of absolute and incurable impotence are happily diminishing in number.

<sup>1</sup> "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary," says Chancellor Kent, "yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction." 2 Kent, Com. 76.

<sup>2</sup> § 18; 1 Bishop, Mar. & Div. 5th ed. §§ 136-142; *Goshen v. Richmond*, 4 Allen (Mass.), 458; 18 Ill. 137; *Wiser v. Lockwood*, 42 Vt. 720; 27 Ga. 102; 31 N. Y. Supr. 461; 97 N. C. 252. In Maine such a marriage may be impeached collaterally. 76 Me. 419.

<sup>3</sup> *Nonnemacher v. Nonnemacher*, 159 Penn. St. 634. See 201 Penn. St. 368.

<sup>4</sup> § 19; 1 Bishop, §§ 321-340, and cases cited; 1 Fraser, Dom. Rel. 53; 28 E. L. & Eq. 95; 5 Paige (N. Y.), 554; L. R. 1 P. & D. 460; L. R. 3 P. & D. 126; L. R. 2 P. & D. 287 (disability possibly curable); L. R. 3 P. & D. 120.

It is reasonable that suit should be required to terminate a marriage on this ground.<sup>1</sup>

20. (5) *Infancy may be an impediment to marriage*; but only so far, on principle, as the marrying party, by reason of imperfect mental and physical development, may be brought within the reason and public policy of the last two rules. Hence we find that infancy is not a bar to marriage to the same extent as in ordinary contracts; since minors cannot repudiate their choice of husband or wife on reaching majority. Not that marriage calls for less discrimination, for it carries with it consequences far beyond all other contracts, involving property rights of the gravest import; but because public policy must protect the marriage institution against the reckless imprudence of individuals.<sup>2</sup> Marriage within the

<sup>1</sup> § 19. 1 Robertson, 279, 298; Stimson, § 6113. And see 10 P. D. 75; 10 App. Cas. 171; 93 Ill. App. 633; 46 Minn. 467.

The refusal of carnal intercourse by a healthy spouse is quite a different matter; nor certainly can physical incapacity arising from some cause subsequent to marriage be referred to this head. See *post* as to Divorce; 24 N. Y. Supr. 324; Cowles v. Cowles, 112 Mass. 298. But obstinate refusal to consummate a marriage may suggest impotence. (1901) Prob. 39.

<sup>2</sup> A certain period is established, called the age of consent, which in England is fixed at fourteen for males and twelve for females, — a rule adopted from the Roman law, but which, in this country, varies all the way from fourteen to eighteen for males and twelve to sixteen for females, according to local statutes; differences of climate and physical temperament contributing, doubtless, to make the rule of nature, in this respect, a fluctuating one. See 2 Kent, Com. 79, notes; Stimson, § 6110. Marriages without the age of consent are as binding as those of adults; marriages within such age may be avoided by either party on reaching the period fixed by law. And even though one of the parties was of suitable age and the other too young, at the time of marriage, yet the former, it appears, may disaffirm as well as the latter; a departure from that principle of law, that an infant may avoid his contract while the adult remains bound. Co. Litt. 79, and Harg. n. 45; 1 Bishop, § 149. But see *People v. Slack*, 15 Mich. 193. Marriages celebrated before both parties have reached the age of consent may be disaffirmed in season, either with or without a judicial sentence. 101 Ind. 317; 177 Ill. 219 (marrying another); 77 N. W. 934; 42 Ohio St. 23. Fraudulent representation by the infant as to his age does not estop him from annulling. *Eliot v. Eliot*, 81 Wis. 295. When the age of consent is reached, no new ceremony is



age of consent seems to be neither strictly void nor strictly voidable, but rather inchoate and imperfect;<sup>1</sup> with, however, a reservation by the ecclesiastical law as to marriage with an infant below seven years, which is treated as altogether null.<sup>2</sup>

21. (6) *As to the impediment of prior marriage undissolved.* It is a well-established rule in civilized countries that marriage between parties, one of whom is bound by an existing marriage tie, is not only void, but subjects the offenders to criminal prosecution.<sup>3</sup> Polygamy, or bigamy, as it is often termed, — since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage, — is discarded by all Christian communities. It was tolerated, but never sanctioned, in certain territory of the United States. The fundamental doctrine of Christian marriage is that no length of separation can dissolve the union, so long as both parties are actually living, even though lapse of time should raise a reasonable supposition of death. But to render the second marriage void at law, the first should have been valid in all respects.<sup>4</sup> Some of the harsher features of the old law have been softened in our own legislation; and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former

requisite to complete the marriage at the common law; but election to affirm will then be inferred from circumstances, such as continued intercourse, and even slight acts may suffice to show the intention of the parties. If they then choose to remain husband and wife, they are bound forever. Disaffirmance, on the other hand, may be either with or without a judicial sentence. § 20.

<sup>1</sup> 2 Kent, Com. 78, 79; 1 Bishop, §§ 143-153; 1 Bl. Com. 436; 1 Fraser, Dom. Rel. 42; Parton v. Hervey, 1 Gray (Mass.), 119; Fitzpatrick v. Fitzpatrick, 6 Nev. 63. Local statutes affect this whole subject.

<sup>2</sup> § 20; 1 Bishop, § 147.

<sup>3</sup> § 21; 2 Kent, Com. 79, and notes; 1 Bishop, §§ 296-303; Hyde v. Hyde, L. R. 1 P. & D. 130.

<sup>4</sup> 2 Eng. Ec. 381; Patterson v. Gaines, 6 How. (U. S.) 550.

spouse dead.<sup>1</sup> But such re-marriage in bad faith and without due inquiry finds no favor.<sup>2</sup>

22. Impediments following divorce may be considered as a statute disqualification under this same head.<sup>3</sup> A divorce *a vinculo* should on general principles leave both parties free to marry again; but such is not always the case.<sup>4</sup> A divorce *nisi* is of course only partial; and a marriage solemnized before the absolute decree can take effect is void.<sup>5</sup>

23. (7) All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract.<sup>6</sup> The

<sup>1</sup> Stimson, Am. Stat. Law, § 6116 ("Enoch Arden" marriage, etc.).

<sup>2</sup> Gall v. Gall, 114 N. Y. 109; 133 Cal. 524 (marriage of the absenting spouse).

As to prosecution for bigamy under modern statutes, see § 21; Bishop, § 297; Stimson, § 6112. A fixed period of absence is stated, — *e. g.* from three to seven years — without being heard from, after whose lapse parties marrying in good faith are relieved from punishment. Bigamy or polygamy, with such exceptions, remains an indictable offence. *Ib.* See 59 N. Y. S. 1068; 182 Mass. 476.

Nor is a new marriage entered into by one spouse in good faith, and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences. *Glass v. Glass*, 114 Mass. 563, and cases cited; 1 Johns. Ch. 389; *Webster v. Webster*, 58 N. H. 3; 124 Penn. St. 646; 141 Mass. 385; *Strode v. Strode*, 3 Bush, 227. Where proceedings for annulling are discontinued upon the death of such former spouse, the parties may marry again. *Sneathen v. Sneathen*, 104 Mo. 201. One who innocently marries another having an undivorced spouse living may have the colorable marriage declared void independently of all divorce legislation. *Fuller v. Fuller*, 33 Kan. 582.

<sup>3</sup> § 23.

<sup>4</sup> *Ib.* See Stimson, § 6241; 1 Bishop, §§ 304–307 (as to restraining the guilty party from marrying again, etc.); 8 B. Monr. (Ky.) 231; 152 Mass. 533; *Mason v. Mason*, 101 Ind. 25; *Clark v. Cassidy*, 62 Ga. 407; *Thorp v. Thorp*, 90 N. Y. 602; 92 N. Y. 521.

<sup>5</sup> *Cook v. Cook*, 144 Mass. 163.

<sup>6</sup> § 23. 2 Kent, Com. 76, 77; 1 Bishop, Mar. & Div. 5th ed. §§ 164–215; *Harford v. Morris*, 2 Hag. Con. 423; 4 Eng. Ec. 575; *Countess of Portsmouth v. Earl of Portsmouth*, 1 Hag. Ec. 355; 3 Eng. Ec. 154; *Scott v. Shufeldt*, 5 Paige (N.Y.), 43; *Dalrymple v. Dalrymple*, 2 Hag. Con. 54, 104; 4 Eng. Ec. 485; *Keyes v. Keyes*, 2 Fost. (N. H.) 553.

law treats a matrimonial union of this kind as absolutely void *ab initio*, and permits its validity to be questioned in any court; at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical constraint of the will; fraud, some deception practised, whereby an unnatural state of the will is brought about.<sup>1</sup> Cases of palpable error, which are very rare, usually contain one or both of these ingredients.<sup>2</sup> As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. The marriage relation is not to be disturbed for trifles, nor can the cumbrous machinery of the courts be brought to bear upon impalpable things. The law, it has been well observed,

<sup>1</sup> 1 Fraser, Dom. Rel. 234.

<sup>2</sup> § 23.

What amount of force is sufficient to invalidate a marriage is a question of circumstances. Evidently the same test could not apply to the mature and the immature, to the strong and the weak, to man and to woman. The general rule is that such amount of force as might naturally serve to overcome one's free volition and inspire terror will render the marriage null. And where the party employing force sustains a superior relation of influence, or a post of confidence affording him special opportunities which he chooses to abuse, this circumstance carries great weight. § 23; 1 Bishop, § 211; Harford v. Morris, 2 Hag. Con. 423; Lyndon v. Lyndon, 69 Ill. 43 (coachman and employer's young daughter); Scott v. Sebright, 12 P. D. 21.

A marriage by compulsion is procured when an adult under illegal arrest is forced to marry; and so, probably, though the arrest were legal, if malicious circumstances are manifest. 9 Car. & P. 80; Soule v. Bonney, 37 Me. 128; 15 Ohio, 408; 1 Day (Conn.), 111; Bassett v. Bassett, 9 Bush (Ky.), 696; Willard v. Willard, 6 Baxter (Tenn.) 297; Vroom v. Marsh, 29 N. J. Eq. 15; Smith v. Smith, 51 Mich. 607. But if a single man under legal arrest marries, by advice of the officer or magistrate, the woman whom he has seduced or got with bastard offspring, in order to escape a just prosecution, meaning a prosecution for probable cause and not a malicious one, the law disinclines to annul such a marriage for duress in case of an adult, but will favor a presumption of honest repentance on his part, and hold him bound; substantial justice being thereby done to the utmost, and the lesser scandal to society permitted in order to avert the greater. Jackson v. Winne, 7 Wend. (N. Y.) 47; 26 N. J. Eq. 440; 33 Ark. 156; State v. Davis, 79 N. C. 603; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24; 42 N. J. Eq. 55; 52 Ark. 425.

makes no provision for the relief of a blind credulity, however it may have been produced.<sup>1</sup> As to error, it may be

<sup>1</sup> Lord Stowell, in *Wakefield v. Mackay*, 1 Phillim. 137. Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. *Caveat emptor* is the harsh but necessary maxim of the law. Love, however indispensable in an æsthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry as to the individual proposed. § 23; 1 Bishop, §§ 166-168; *Lewis v. Lewis*, 44 Minn. 124 (concealment of kleptomaniac habits, no fraud as to essentials).

Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue. § 23; Bishop, §§ 170, 179; 1 Fraser, Dom. Rel. 231; 1 Add. Ec. 411; *Leavitt v. Leavitt*, 13 Mich. 452; *Wier v. Still*, 31 Iowa, 107. If the profligate continue a profligate after marriage, the divorce laws afford a means of escape to the deluded victim. Still, as this doctrine seems to bear hard upon innocent persons marrying in good faith and with misplaced confidence, it is applied not without some limitations. Thus it is held that where a woman, pregnant by another man at the time of the nuptials, bears a child soon after to an innocent husband, the marriage may be avoided by him; for she has thereby not only inflicted upon him, by deception, the grossest possible moral injury, but subjected them both to scandal and ill-repute. *Reynolds v. Reynolds*, 3 Allen (Mass.), 605. See also 13 Cal. 87; 3 Barb. Ch. 132; *Allen's Appeal*, 99 Penn. St. 196; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467 (where the woman, by a cunning stratagem, made the man think she was pregnant by him instead of by another, and so induced marriage). Courts, however, have taken heed not to press this exception far. If a man marries any woman whom he knows to be unchaste and pregnant, it is his own folly if he places implicit confidence in any of her statements. *Crehore v. Crehore*, 97 Mass. 380; 12 Allen (Mass.), 26; 46 N. J. L. 380; 174 N. Y. 467. See also 175 Mass. 157, 383 (concealment of a venereal disease); 79 N. Y. S. 657. And if he was unchaste with her himself, he debars himself from complaining that he found her pregnant by another. 40 N. J. Eq. 412; 12 Allen (Mass.), 26. Cf. 174 N. Y. 467. But whenever an innocent man marries a woman, supposing her, with reason, to be virtuous, and she conceals her pregnancy from him, the subsequent production of another man's child so unpleasantly complicates the marriage relation that he ought to be allowed his exit if he so desires, both in justice to himself and because the woman knew the risk she ran of bringing the parental relation to shame by marrying, and chose to incur it. In short, while marriage may be accepted by any one whose past life has been dissolute, as the

said, as in fraud, that the error should reach the essentials; and Chancellor Kent justly observes that it would be difficult to find a case where simple error, without some other element, would be permitted to vacate a marriage.<sup>1</sup> But the palpable substitution of some other individual for the person actually accepted and intended for marriage may properly be repudiated by the victim to the fraud.<sup>2</sup> The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated.<sup>3</sup> And in general a mock marriage in jest is no marriage, though a dangerous sport.<sup>4</sup>

24. In most of the reported cases of force, fraud, and error, two or more of these elements are united; and frequently another distinct impediment appears, such as tender years on the part of the injured party; or, with regard to the offender, the suppression of material facts relative to some former marriage, or to his own mental or physical incapacity; or some other cause of nullity is shown by the evidence. In the reported cases, where the complainant was successful, some unprincipled man has generally sought to gain undue advantage from the person and fortunes of one whose feebler will

portal to a new and honest career, for which reason concealment of the past cannot legally be predicated of either party as an essential fraud, we apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness. § 23.

<sup>1</sup> 2 Kent, Com. 77; § 23. See Lord Campbell, in *Reg. v. Millis*, 10 Cl. & F. 534, 785; 1 Bishop, Mar. & Div. § 207; Feilding's Case, cited in Burke's Celebrated Trials, 63, 78, and in 1 Bishop, § 204 (deception of one who was courted as a certain rich widow).

<sup>2</sup> Fiction supplies such instances, as in Scott's novel, *St. Ronan's Well*. In *Rex v. Burton*, 3 M. & S. 537, the marriage of a scoundrel palming himself off as a certain individual of good repute was annulled; but, generally speaking, deception as to name is not regarded as more fatal than deception concerning character or fortune. § 23.

<sup>3</sup> *Clark v. Field*, 13 Vt. 460.

<sup>4</sup> *McClurg v. Terry*, 21 N. J. Eq. 225. See *post*, § 26.

or overstrained condition of mind rendered her an easy prey; it rarely, if ever, appears that such force or fraud has led to a reasonable and well-assorted match. Such unequal alliances need find favor from no tribunal.<sup>1</sup> All marriages of this sort are binding without further ceremony, provided the injured party sees fit to affirm it after all constraint is removed, or, in other words, to perfect the consent; but no such freedom of choice seems to be left to the offending party. Hence this sort of marriage seems neither void nor voidable in the legal acceptation; but rather inchoate or incomplete until ratified, though void if the injured choose so to treat it. Where consummation never followed the nuptials, the courts are the more readily disposed to set aside the match; but in any event copulation, with knowledge of the fraud, and after removal of all constraint, is an effectual bar to relief.<sup>2</sup> Here as in all analogous instances the complainant should appear not to have yielded knowingly and willingly to the situation.<sup>3</sup>

25. (8) The important subject of a formal marriage observance is now to be considered. We are to consider this topic

<sup>1</sup> § 24. See *Heffer v. Heffer*, 3 M. & S. 265; 3 M. & S. 587; *Robertson v. Cole*, 12 Tex. 356; 1 Bishop, § 199; *Lyndon v. Lyndon*, 69 Ill. 43; *Powell v. Cobb*, 3 Jones, Eq. 456; *Scott v. Sebright*, 12 P. D. 21.

<sup>2</sup> 1 Bishop, §§ 214, 215; 1 Fraser, Dom. Rel. 229; *Scott v. Shufeldt*, 5 Paige (N. Y.), 43; *Leavitt v. Leavitt*, 13 Mich. 452; *Hampstead v. Plaistow*, 49 N. H. 84.

<sup>3</sup> See *Cooper v. Crane*, (1891) P. 369, where a woman entered church and went through the ceremony without signs of unwillingness; facts taken strongly against her though the marriage was never consummated.

The issue, we may add, is between the offender and the injured party, and third persons have no right to interfere, even though it be alleged that there was intent to defraud them in their own property interests. *McKinney v. Clarke*, 2 Swan (Tenn.), 321. In fact, marriage stands or falls by public permission with reference only to the marriage parties; and wherever they have legally assumed the relation as one agreeable to themselves, outsiders cannot meddle with the status from outside considerations. Where, too, a marriage has been effected through the fraudulent conspiracy of third persons, the rule is that, unless one of the contracting parties is cognizant of the fraud, the marriage is perfect; but, if cognizant it is to be deemed the fraud of such party and treated accordingly. 2 Hag. Con. 238, 246; *Rex v. Minshull*, 1 Nev. & M. 277; *Barnes v. Wyethe*, 28 Vt. 41; *Bassett v. Bassett*, 9 Bush (Ky.), 696; § 24.

in two separate aspects: (a) as to marriage observance in the absence of civil requirements: (b) as to marriage observance under the statutes now in force in England and America. It is to be premised, however, by way of enlarging upon the idea of perfect and imperfect consent suggested under the last head, that some form of marriage promise, some ceremony, however slight, has always been deemed essential to the validity of marriage.<sup>1</sup>

26. (a) To constitute a marriage aside from civil requirements, — or, in other words, to constitute an informal marriage, — words and conduct clearly expressing mutual consent are sufficient without other solemnities.<sup>2</sup> Informal celebra-

<sup>1</sup> The common language of the books is that, in the absence of civil regulations to the contrary, marriage is a contract, and nothing but mutual consent is required. And the old maxim of the Roman law is quoted to support this view: *Nuptias non concubitus, sed consensus, facit*. But is there not an ambiguity in the use of such language? For it is material to ask whether *consensus*, or *consent*, is used in the sense of simple volition or an expression of volition. We maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases a *simple expression of mutual consent*, and no more. For the very definition of marriage implies that there should be not only the consenting mind, but an expression of the consenting mind, by words or signs, which expression in proper form constitutes in fact the marriage agreement.

Here, however, we distinguish between the promise of marriage in the future, such as involves a mere engagement to marry and renders one liable in breach of promise suits; and such promises as justify the inference that there is a marriage. § 25.

<sup>2</sup> Two forms of consent are mentioned in the books: the one, consent *per verba de presenti*, with or without consummation; the other, consent *per verba de futuro*, followed by consummation. § 26; 1 Bishop, § 227; 2 Rob. App. Cas. 547. And see *De Thoren v. Attorney-General*, 1 H. L. App. 686, as to consent by habit and repute; L. R. 1 H. L. Sc. 182. So, too, there is reason to suppose that the marriage *per verba de futuro* is of the same sort as the former; marriage *per verba de presenti* constituting the only real marriage promise, while consummation following *de futuro* words of promise raises simply a legal presumption, not probably conclusive, that words *de presenti* afterwards passed between the parties. The copula is no part of the marriage; it only serves to some extent as evidence of marriage. *Port v. Port*, 70 Ill. 484; *Jackson v. Winne*, 7 Wend. (N. Y.) 47; *Peck v. Peck*, 12 R. I. 485. *Consensus, non concubitus*, is the maxim of the civil, ecclesiastical, and common law alike. § 26;

tion constitutes marriage as known to natural and public law. The English canon law, as it stood previous to the Council of Trent, the law of Scotland and in various European countries, the law of many of the United States, and perhaps the common law of England, all dispense with the ceremonial observances of formal marriage.<sup>1</sup> Informal marriage is to be sustained on the theory that an institution of such fundamental importance to our race ought to be good independently of, and prior to, the formal requirements which human government imposes at an advanced stage of society. But, as we shall see, the marriage acts now in force in England and some of the United States render certain solemnities, religious or secular, indispensable.<sup>2</sup> There should not only be words

*Dalrymple v. Dalrymple*, 2 Hag. Con. 54. But certain codes now provide that consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, and obligations. 79 Cal. 663. And see *Lorimer v. Lorimer*, 124 Mich. 681; 196 Ill. 482; 204 Ill. 25.

<sup>1</sup> Informal marriage has been recognized to a greater or less extent in the United States. *Dickerson v. Brown*, 49 Miss. 357; *Hutchins v. Kimmell*, 31 Mich. 126; *Port v. Port*, 70 Ill. 484; *Lewis v. Ames*, 44 Tex. 319; *Dyer v. Brannock*, 66 Mo. 391; *Campbell v. Gullatt*, 43 Ala. 57; *Askew v. Dupree*, 30 Ga. 173; *Hynes v. McDermott*, 91 N. Y. 451; *White v. White*, 82 Cal. 427; (Kan.) 55 P. 286 (especially where no impediment exists); 60 Kan. 277; 25 Utah, 120; (Mo.) 115 Fed. (U. S.) 124; 96 U. S. 76. But Maryland repudiates the doctrine of informal marriages. *Denison v. Denison*, 35 Md. 361; as by force of statute or otherwise, do certain other States. See 29, *post*. And see *Dysart Peerage Case*, 6 App. Cas. 489 (1881). "By the common law, if the contract be made *per verba de presenti*, it is sufficient evidence of marriage; or if made *per verba de futuro cum copula*, the *copula* would be presumed to have been allowed on the faith of the marriage promise, so that at the time of the *copula* the parties accepted each other as husband and wife. On this subject the maxim of the law is inexorable, that it is the consent of parties, and not their concubinage, that constitutes valid marriage. The well-being of society demands a strict adherence to this principle." *Hebblethwaite v. Hepworth*, 98 Ill. 126, 132. See 196 Ill. 482; 204 Ill. 25.

<sup>2</sup> And the great, the almost insuperable, difficulty which presents itself at the outset in such cases is clearly indicated: "A marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition.



of promise, but they should be uttered with matrimonial intent. Not even is a solemn companionship, assumed on other fundamental conditions than those which public policy assigns to the institution a marriage, of this character.<sup>1</sup>

But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, — that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, a *marriage in the sight of God*." *Lindo v. Belisario*, per Lord Stowell, 1 Hag. Con. 216; 4 Eng. Ec. 367, 374; 1 Fraser, Dom. Rel. 149, 184, 187, 212. Did parties therefore coming thus together mean fornication, or did they mean marriage? If they meant marriage, was it a "permanent union," so called, on their own terms or on the terms which a well-ordered society enforces, regardless of the wishes of a pair?

<sup>1</sup> As where a man and woman made in presence of witnesses a "co-partnership" contract in writing to live together "so long as mutual affection shall exist." *Peck v. Peck*, 155 Mass. 479.

To ascertain the purpose of the parties in each case, the courts will look at all the circumstances, and even admit parol evidence to contradict the terms of a written contract. For writings of matrimonial acknowledgment may have been interchanged as a blind or cover for some scheme well understood between the parties. § 26; 2 Hag. Con. 54, 105. Or again by way of jest. *McClurg v. Terry*, 21 N. J. Eq. 225; *Clark v. Field*, 13 Vt. 460. But, in cases of doubt, the rule is to sustain the marriage as lawful and binding. If there has been continued intercourse between the parties, this presumption becomes of course still stronger. And if promises were exchanged while one acted in good faith and in earnest, the other is not permitted to plead a mental reservation. § 26; 25 Utah, 129.

A betrothal followed by copulation does not make this informal marriage a legal one, when the parties looked forward to a formal marriage ceremony, and did not agree to become husband and wife without it. *Peck v. Peck*, 12 R. I. 485; *Beverson's Estate*, 47 Cal. 621. And a union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage. See *Floyd v. Calvert*, 53 Miss. 37; *Duncan v. Duncan*, 10 Ohio St. 181; *Hunt's Appeal*, 86 Penn. St. 294; *Williams v. Williams*, 46 Wis. 464; *Barnum v. Barnum*, 42 Md. 251; 183 Ill. 61; 191 Ill. 424. Cohabitation and reputation afford no presumption of marriage under such circumstances. 113 Penn. St. 204; 57 N. Y. S. 53. Perhaps the Scotch law is less emphatic on this point.

27. Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation.<sup>1</sup> And yet a proper regard for the real intention of the cohabiting pair encourages often the presumption of innocence and good faith, even where the relation assumed was an illegal one. Supposing two persons to have made an informal marriage, in the mistaken belief that the former spouse of one of them was already dead, or that some sentence of divorce left them, in like manner, free to unite. This case should be distinguished from that of some original understanding for a mere carnal commerce. And if the impediment becomes removed in the course of their cohabitation under such circumstances, and the pair live continuously together as man and wife, no new ceremony, agreement, or visible change in their relation would probably be deemed requisite to establish matrimonial consent subsequent to the removal of the impediment; for here the original intention continues, but in the case of carnal commerce necessarily changes, in order that an honest relation may be presumed.<sup>2</sup>

28. Words of present promise, in order to constitute an informal marriage, must contemplate a present, not a future, assumption of the status. And herein lies a difficulty: that of discriminating between actual marriage and what we now

Breadalbane's Case, L. R. 1 H. L. Sc. 182; and see 115 Fed. (U. S.) 124.

<sup>1</sup> Myrick Prob. (Cal.) 100. Yet such conduct and general repute may supply strong circumstantial proof; as also does conduct in christening offspring, etc. 115 Fed. (U. S.) 124.

<sup>2</sup> See *De Thoren v. Attorney-General*, 1 H. L. App. 686, where the impediment followed divorce. And see 206 Ill. 288.

As to disbelief in ceremonies or conscientious scruples, see *Bissell v. Bissell*, 55 Barb. (N. Y.) 325.

A late interesting Scotch case illustrates the painful uncertainty which hangs about these informal marriages. *Stewart v. Robertson*, L. R. 2 H. L. Sc. 494; § 26.

commonly term an engagement. If the agreement be by words of present promise, — as if the parties should say, “We agree to be henceforth man and wife,” — the marriage is perfect. The form of expression is not material.<sup>1</sup> The proposal of one must be actually accepted by the other; yet such acceptance may be indicated by acts, such as a nod or courtesy. The mutual consent may be expressed orally or in writing. Written promises are of course unnecessary; though the reported cases show frequently letters or other writings, interchanged, from which the intent was gathered.<sup>2</sup> More uncertainty arises in matrimonial contracts where a condition inconsistent with marriage is superadded; but *bona fide* intent may be fairly presumed where there are no special circumstances to throw light upon the conduct of the parties.<sup>3</sup> Marriage by words of future promise is consummated when two persons agree to marry at some future period and afterwards actually do cohabit. The foundation of this doctrine is the presumption that the parties meant right rather than wrong, and hence that copulation (otherwise criminal) was permitted on the faith of the marriage promise. But in this class of cases it is requisite that the promise *de futuro* should be absolute and mutual and in good faith.<sup>4</sup> Innocence will

<sup>1</sup> 1 Bishop, §§ 227, 229; 1 Fraser, Dom. Rel. 145-149.

And Swinburne says that though the words should not of themselves conclude matrimony, yet the marriage would be good if it appeared that such was the intent. Swinb. Spousals, 2d ed. 87.

<sup>2</sup> See *Sapp v. Newsom*, 27 Tex. 537, where marriage by means of mutually executing a bond or contract is sustained under the old law, which was of Spanish origin. But cf. *State v. Miller*, 23 Minn. 352. In the celebrated Scotch case of *Dalrymple v. Dalrymple*, a marriage promise was established from a correspondence which the woman preserved. 2 Hag. Con. 54.

<sup>3</sup> § 27; 1 Bishop, §§ 245-250; 23 Minn. 352; 83 Ill. App. 341; 180 Ill. 577; 60 Kan. 277; *Hamilton v. Hamilton*, 9 Cl. & F. 327; 6 Binn. (Penn.) 405; *Peck v. Peck*, 155 Mass. 479; *Bissell v. Bissell*, 55 Barb. 325 (an interesting state of facts, upon which it was decided that the marriage was valid).

<sup>4</sup> Mere courtship does not suffice, though followed by carnal intercourse. 1 Fraser, Dom. Rel. 188; *Reg. v. Millis*, 10 Cl. & F. 534, 780; *Peck v. Peck*, 12 R. I. 485; 47 Cal. 621; 3 A. K. Marsh. (Ky.) 868;

be inferred, if possible, rather than guilt.<sup>1</sup> So it has been said that where a legal impediment exists to a marriage between persons living in licentious intercourse, as the impediment sinks the status rises.<sup>2</sup>

29. (b) To consider formal celebration of marriage. All this learning of informal marriages, if there was ever much of it, was swept out of the English courts when formal religious celebration was prescribed by positive statute. Ceremonials had long been required by those canons upon which the ecclesiastical law was based. Lord Hardwicke's Act, passed in the reign of George II.,<sup>3</sup> is the most famous of

1 Bishop, §§ 253-265; Port v. Port, 70 Ill. 484; Schouler, Hus. & Wife, § 38. Nor in general do words of promise with immoral conditions annexed. It is admitted that no familiarities short of the copula will convert such loose espousals into matrimony. 1 Bishop, § 253. By the better opinion, cohabitation after *verba de futuro* raises no conclusive presumption of marriage at law, but the intent of the parties may be shown as in other cases. § 27. Seduction under breach of promise does not constitute a marriage. Schouler, Hus. & Wife, §§ 40-51.

<sup>1</sup> See Cheney v. Arnold, 15 N. Y. 345; Duncan v. Duncan, 10 Ohio St. 181; 10 Cl. & F. 534; Robertson v. State, 42 Ala. 509.

<sup>2</sup> De Thoren v. Attorney-General, 1 H. L. App. 686; 1 Bishop, § 248; 115 Fed. (U. S.) 124. Continuous cohabitation within Scotland establishes marriage in Scotch law, but cohabitation outside Scotland will not constitute marriage. Dysart Peerage Case, 6 App. Cas. 489.

In some States it is maintained quite broadly that all informal marriages were unknown to the English common law. Cheney v. Arnold, 15 N. Y. 345; Denison v. Denison, 35 Md. 361; 1 Abb. (U. S.) 525; Duncan v. Duncan, 10 Ohio St. 181; Port v. Port, 70 Ill. 484; 81 Mo. App. 562. This last has been long a mooted point in the courts, and will ever remain so; but whatever may have been the historical fact, certain it is that the necessity of a more formal observance of marriage has been almost universally recognized; and the very words, "marriage in the sight of God," so familiar to the readers of the Scotch matrimonial law, not only import the peculiar embarrassments which attend the justification of such loosely contracted alliances before the world, but attest the solemn character of a fundamental institution of society. See § 27; State v. Miller, 23 Minn. 352; Commonwealth v. Munson, 127 Mass. 459; 82 Miss. 703.

<sup>3</sup> 26 Geo. II. c. 33 (1753). This act required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the banns; and marriages not so solemnized were pronounced void, unless dispensation should be granted by special license.

these statutes. More recent legislation permits of a civil ceremonial before a register, to satisfy such as may have conscientious scruples against marriage in church.<sup>1</sup> Such, too, is the general tenor of State legislation in this country; the law justly regarding civil observances together with public registration sufficient for its own purposes, while human nature clings to the religious ceremonial.<sup>2</sup> Among most

Some harsh provisions of this act were relaxed in the reign of George IV., but soon re-enacted. 3 Geo. IV.; 4 Geo. IV. c. 76.

<sup>1</sup> § 28. (Stats. of Wm. IV. & Victoria.)

<sup>2</sup> § 28; 2 Kent, Com. 88-90; 1 Bishop, Mar. & Div. 5th ed. § 279; Stimson's Am. Stat. Law, § 6120. In some States (*e. g.* Massachusetts) the latest inclination is to limit the range among civil officers; so that only certain justices of the peace may perform a marriage.

It is to be borne in mind that Lord Hardwicke's Act is of too recent a date to be considered as part of our common law. Was marriage *in facie ecclesiæ* essential in England before the passage of this act? It is admitted that the religious marriage celebration was customary previous to the Reformation. It is further allowed that the church, centuries ago, created an impediment, now obsolete, called "precontract," the effect of which was that parties engaged to be married were bound by an indissoluble tie, so that either one could compel the other to submit at any time to the ceremonial marriage. But whether precontract rendered children legitimate, and carried dower, curtesy, and the other incidents of a valid marriage, is not clear. In 1844 the question, whether at the common law a marriage without religious ceremony was valid, went to the English House of Lords, and resulted in an equal division. *Reg. v. Millis*, 10 Cl. & F. 534. And, curiously enough, such was the fate of a similar case in this country before the highest tribunal in the land. *Jewell v. Jewell*, 1 How. (U. S.) 219. But see *Meister v. Moore*, 96 U. S. 76.

The American doctrine is, that the intervention of one in holy orders was not essential at common law. This is the view of Chancellor Kent, Judge Reeve, and Professor Greenleaf, as expressed in their respective text-books, also the general current of American decisions. Mr. Bishop confirms these conclusions while suggesting new reasons for such an American doctrine; as, for instance, that in these colonies the attendance of one in holy orders, and more especially of an ordained clergyman of the established church, could not always be readily procured. See 1 Bishop, Mar. & Div. 5th ed. §§ 279-282; and decisions collated; 2 Kent, Com. 87; Reeve, Dom. Rel. 195 *et seq.*; 2 Greenl. Ev. § 460; § 28. But in several States the contrary is declared to be the common law; and statutory forms are declared requisite, and the doctrines of informal marriage denied more or less emphatically, as the foregoing pages have shown. §§ 26, 28.

nations and in all ages has the celebration of marriage been attended with peculiar forms and ceremonies, which have partaken more or less of the religious character. Even the most barbarous tribes so treat it where they hold to the institution at all. The Greeks offered up a solemn sacrifice, and the bride was led in great pomp to her new home. In Rome, similar customs prevailed down to the time of Tiberius. Marriage, it is true, degenerated afterwards into a mere civil contract of the loosest description, parties being permitted to cohabit and separate with almost equal freedom. The early Christians, there is reason to suppose, treated marriage as a civil contract, yielding, perhaps, to the prevailing Roman law. Yet the teachings of the New Testament and church discipline gave peculiar solemnity to the relation. And religious observances must have prevailed at an early date, for in process of time marriage became a sacrament. In England, centuries later, it needed only Lord Hardwicke's Act to apply statute law to a universal practice; for although, in the time of Cromwell, justices of the peace were permitted to perform the ceremony, popular usage by no means sanctioned the change. Informal marriages are uncommon even in Scotland, where the civil law prevails. In our own country it is not surprising that local jurisprudence should have exhibited some signs of reaction against ancient canon and kingly ordinance. Yet, even with us, the almost universal custom repudiates informal and civil observances; and, secured in the privilege of choosing prosaic and business-like methods of procedure, Christian America yields its testimony in preference of marriage *in facie ecclesiæ*.<sup>1</sup>

30. But many American courts, out of consideration for what may be termed the public, or natural and theoretical law of marriage, have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal celebration. Marriage being a matter of common right, it is lately held by the highest

<sup>1</sup> See 2 Kent, Com. 89, and authorities cited; § 28, commenting upon Reeve, Dom. Rel. 196.

tribunal for harmonizing the rule of States, that, unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded.<sup>1</sup> While the main purpose of enforcing upon civilized and populous communities marriage rites appropriate to so solemn an institution is surely desirable, it will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a non-compliance with the literal forms. And this is right; for while formal celebration is a shield to honest spouses and their posterity, rigor in the details of form, especially in inconvenient or trivial details, or those which it is incumbent rather upon third persons to respect, must expose society to new dangers.<sup>2</sup>

<sup>1</sup> *Meister v. Moore*, 96 U. S. 76 (the rule in Michigan); *Hutchins v. Kimmell*, 31 Mich. 128; 88 Mich. 279.

<sup>2</sup> Thus is it as concerns place; while as to the due proclamation of banns, collateral points concerning ecclesiastical authority are inappropriate. *Queen v. Cresswell*, 1 Q. B. D. 446; *Hutton v. Harper*, 1 H. L. App. 464; *Askew v. Dupree*, 30 Ga. 173; 3 Wall. (U. S.) 175; *Holmes v. Holmes*, 6 La. 463; *Stevenson v. Gray*, 17 B. Monr. (Ky.) 193. Presumptions cannot be indulged against the continuance of a *bona fide* marriage relation. *Wiseman v. Wiseman*, 89 Ind. 479. A consistent reputation of being married carries its full weight as to cohabiting parties, who appear to have lived together as husband and wife. *Lauderdale Peerage*, 10 App. Cas. 692; 91 N. Y. 451; 28 Hun, 235; *Northrop v. Knowles*, 52 Conn. 522; *Betsinger v. Chapman*, 88 N. Y. 487 (subsequent marriage).

Marriage certificates and copies of marriage records are treated with especial favor as proof. 60 N. H. 418; 78 Me. 20. But record evidence is not essential. The testimony of the person who performed the ceremony or of some witness present is otherwise desirable. Indirect and circumstantial proof has, however, its use in an emergency. To prove a marriage by cohabitation and repute, the reputation should be general and uniform. § 29.

Though the parties may have failed to observe certain formalities of license or registry, their marriage will generally be held good in both England and this country, even though the magistrate or clergyman should subject himself to a penalty for the irregularity. *Schouler, Hus. & Wife*, § 85; 1 Bishop, Mar. & Div. §§ 283, 287. There are various local

31. The consent of parents and guardians is one of those formalities which marriage celebration acts now commonly prescribe in the interest of society, as they do banns or the procurement of a license generally for better publicity.<sup>1</sup> Clandestine marriages are doubtless to be discouraged, and the

statutes to the effect that where parties consummate a marriage in good faith before a justice of the peace or minister, &c., the marriage shall not be deemed void on account of the want of authority of such person. Stimson, Am. Stat. Law, § 6187. And a marriage among the Friends or the Jews is also allowed to be solemnized after their peculiar customs. *Ib.*, § 6135. On the other hand, our ceremonial statutes of marriage, which require fulfilment at all, must, in fundamental respects at all events, be complied with. Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of some responsible third person. And hence, unless parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot. *Commonwealth v. Munson*, 127 Mass. 459. And see 7 Mass. 48; *Tholey's Appeal*, 93 Penn. St. 36; *Norcross v. Norcross*, 155 Mass. 425. But cf. 1 Bishop, § 289. It was once held in Ireland that a clergyman might marry himself. A verbal reservation just previous to a marriage ceremony by one of the parties is not readily supposed to invalidate the marriage. *Brooke v. Brooke*, 60 Md. 524.

<sup>1</sup> Such consent was not necessary to perfect a marriage at the common law. But Lord Hardwicke's Act (26 Geo. II.) made the marriage of minors void without consent of parents or guardians first obtained. This proved intolerable. A *bona fide* and apparently regular marriage was in one instance set aside, after important rights had intervened, for no other cause than that an absent father, supposed to be dead, but turning up unexpectedly, had failed to bestow his permission, so that the mother had acted in his stead. *Hayes v. Watts*, 2 Phillim. 43. *Gretna Green* marriages, on Scotch soil, became the usual recourse for children with unwilling protectors. Hence the law was afterwards modified, so that, without the requisite consent, marriages, although forbidden, might remain valid. Stat. 4 Geo. IV. c. 76. And see 8 B. & C. 29; 39 L. T. x. s. 111. These latter features are found to characterize most marriage acts in the different States of this country. § 30; 1 Bishop, §§ 341-347; *Smyth v. State*, 13 Ark. 696; 2 Halst. (N. J.) 138; and see *Wood v. Adams*, 85 N. H. 32; *Kent v. State*, 8 Blackf. (Ind.) 163; *Askew v. Dupree*, 30 Ga. 178; 6 Nev. 63; *Adams v. Cutright*, 53 Ill. 361; *State v. Dole*, 20 La. Ann. 378. The language of some statutes leaves the point in doubt as to whether marriage without the consent of parents renders the marriage void, or only subjects offending parties, including the person who performs the ceremony, to a penalty. But the latter is, of course, to be presumed rather than the former. See further, Schouler, *Hus. & Wife*, § 36; § 30.



law will willingly inflict penalties upon clergymen, magistrates, and all others who aid the parties in their unwise conduct, the penalty serving in a measure as indemnification to the parent or guardian; but experience shows that legislation cannot safely interpose much further.

**32. Defective marriages, we may further observe,** have in some instances been legalized by statute; as where parties within the prohibited degrees of consanguinity or affinity had united. So with marriages before a person professing to be a clergyman or justice of the peace, but without actual authority. On principle, in fact, there seems no reason to doubt that any government, through its legislative branch, may unite a willing pair in matrimony, as well as pass general laws for that purpose;<sup>1</sup> unless, as is sometimes found, the State constitution prohibits such enactments.<sup>2</sup>

**33. The policy of restraining marriage** is treated with disfavor by our law, which on the contrary seems disposed to encourage the institution, though not to the extent practised by some countries of openly promoting its observance, or forcing private inclination in the conjugal direction. Numerous cases, those particularly which construe the provisions of testamentary trusts, have laid it down that the general restraint of marriage is to be discouraged. Accordingly a condition subsequent, annexed by way of forfeiture to a gift, legacy, or bequest, in case the donee or legatee should marry, will be held void and inoperative, as a restraint upon marriage, and so as to both income and capital.<sup>3</sup>

<sup>1</sup> § 31; 2 Greenl. (Me.) 28; *Moore v. Whittaker*, 2 Harring. (Del.) 50; *Goshen v. Richmond*, 4 Allen (Mass.), 458; 1 Bishop, Mar. & Div. §§ 657-659. See *Rice v. Rice*, 31 Tex. 174.

<sup>2</sup> But though legislative divorces are not unfrequent, a legislative marriage is something unknown, not to say uncalled for. And in this country, peculiar questions of fundamental constraint under a written constitution might arise, even where the cure only of a defective marriage was sought by the legislature; inasmuch as the intervening rights of third persons might thereby be prejudiced. § 31.

<sup>3</sup> See *Bellairs v. Bellairs*, L. R. 18 Eq. 510, and cases cited.

But marriage and remarriage are differently viewed in this respect; and it is well settled that forfeiture by condition subsequent in case a

34. The general rule is that marriage contracted elsewhere, if valid where it is contracted, is locally valid.<sup>1</sup> And so strongly is the marriage institution upheld the civilized world over, that even though the marrying parties thereby evade the local law, this rule is locally upheld in both countries; unless, at all events, the local statute asserts local public policy to the extent of declaring such marriages void, or the marriage is one deemed contrary to the law of nature as generally recognized in Christian countries.<sup>2</sup>

widow shall marry again must be upheld as valid, whether that widow be the beneficiary through her husband or some other person. Does the latter rule apply equally to widow and widower, woman and man? Upon full consideration the English chancery held a few years ago, on appeal (reversing the decision of the lower tribunal), that it does. *Allen v. Jackson*, 1 Ch. D. 399, reversing s. c. L. R. 19 Eq. 631. See opinion of James, L. J., and authorities cited,—this interesting point being thus raised for the first time. Rights are equal as to marrying again, so far as widow and widower are concerned, as all will readily admit.

See further as to restraints on marriage, § 33 and cases cited; Schouler, *Wills*, § 603.

<sup>1</sup> 61 Neb. 589. A marriage, invalid where contracted is invalid everywhere. 70 N. Y. S. 406 (contracted in France).

<sup>2</sup> § 33 a. *Warrender v. Warrender*, 2 Cl. & Fin. 488; *Sutton v. Warren*, 10 Met. (Mass.) 451; 157 Mass. 75, per Field, C. J.; 171 Mass. 560. As where, for instance, parties go to another State to evade restrictions as to an infant's marrying age, or restrictions following divorce. See 54 P. 143 (going on the high seas to evade law); *Bozzelli, Re*, (1902) 1 Ch. 751 (marriage with deceased husband's brother); 79 N. W. 39. Under the English "legitimacy declaration act" (21 & 22 Vict. c. 93) the marriage of a retired British officer to a Japanese woman in 1886 was held valid in *Brinkley v. Attorney-General*, 15 P. D. 76, as sufficiently a "Christian marriage," upon proof that in Japan marriage is monogamous, and excludes all other spouses. As to recognizing Indian tribal marriages, see 76 Mich. 498; (Oreg. 1903) 74 P. 491; 97 Mo. 80. Cf. as to informal marriages, 155 Mass. 425; *Meister v. Moore*, 96 U. S. 76; § 29.

## CHAPTER II.

### EFFECT OF MARRIAGE; PERSON OF THE SPOUSE.

35. When the parties to a lawful marriage have once completed the ceremony, or, as it is said, have executed the contract of marriage, they are admitted into the marriage relation, and their mutual rights and obligations become at once bounded, protected, and enforced by the general law of husband and wife. What that law is will constitute our main topic of discussion.<sup>1</sup> This subject will be most conveniently treated by taking up the common-law doctrine first, and thoroughly examining its principles; then passing to the modern or civil-law doctrine for discussion in like manner. First, then, the rights and disabilities of marriage on the coverture scheme; next, the rights and disabilities of marriage on the separate existence scheme, or with the innovations which equity and modern statutes have made. But since these rights and disabilities have varied less with regard to the wife's person than in other respects, we may here investigate those general principles of the common law which concern the person of the spouse, once and for all.<sup>2</sup>

36. As to the person of the spouse, the general principle of coverture, defined by Blackstone and other common-law writers, is this: that by marriage the husband and wife become one person in law; that is to say, the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the hus-

<sup>1</sup> We have already alluded to the confusion and uncertainty which exist at the present day, and particularly in many of the United States, in the law of husband and wife, owing to the transition period through which we seem to be passing from the marriage relation of the common law to that known to the civil law. See Introductory, 4-8.

<sup>2</sup> § 33.

band, under whose wing, protection, and *cover* she performs everything; and is therefore called in the law-French a *feme covert*, *fœmina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her *baron* or lord; and her condition during her marriage is called her *coverture*. For this reason the term applied to the relation of husband and wife in the old books is *baron and feme*. Upon this fundamental principle depend, at the common law, the general rights, duties, and disabilities of marriage.<sup>1</sup> The husband's right of dominion is therefore fully recognized at the common law.<sup>2</sup> In accordance with these principles, and perhaps, too, the laws of nature and divine revelation, the husband is the head of the family, and *dignior persona*.<sup>3</sup>

<sup>1</sup> 1 Bl. Com. 442; Co. Litt. 112; 2 Kent, Com. 129; § 34. But this very definition shows inaccuracy, to say nothing of unfairness of application. Here are two conflicting notions: one that the existence of the wife is actually lost or suspended; the other that there is still an existence, which is held in subordination to the will of her lord and master, which last the word *coverture* fitly expresses. It will appear in fact that while some of the wife's disabilities seem based upon the one notion, others are based upon the latter, and probably more correct one. The wife's disabilities are deemed by Blackstone "for the most part intended for her protection and benefit." And he adds, by way of rhetorical period, "so great a favorite is the female sex of the laws of England!" a proposition which his commentators have gravely proceeded to dispute and dissect, and, it must be added, not without good success. 1 Bl. Com. 445, notes by Christian, Hargrave, and others. It is probable that Blackstone used this expression in a strain of playful gallantry, not uncommon with lecturers. Even Chancellor Kent's observations are not free from suspicion. See 2 Kent, Com. 182, closing sentence at foot of the page.

<sup>2</sup> "The naturalest and first conjunction of two towards the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force; and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one." Commonwealth of England, by Sir Thomas Smith, Book 1, ch. 2, quoted in Bing. Inf. & Cov. p. 184; § 34.

<sup>3</sup> As to the more strictly personal consequences of the marriage union,

37. Marriage necessarily supposes a home and mutual cohabitation. Each party has therefore a right to the society of the other; they married to secure such society; and the obligation rests upon both to live together, — or, as the expression sometimes goes, *to adhere*. This is the universal law.<sup>1</sup> Its observance is essential to the mutual comfort of husband and wife, and the well-being, if not the existence, of their children. But to this rule there are obvious exceptions. The wife is not bound to live with her husband where he is imprisoned, or has otherwise ceased to be a voluntary agent and to perform the duties of a husband; nor if he is banished. For marriage does not force the parties to share the punishment of one another's crimes. This was the rule of the civil as it is that of the common law.<sup>2</sup> And in general such causes as would justify divorce in any State justify the innocent party in breaking off matrimonial cohabitation likewise. But partial and temporary separation for purposes connected with the husband's profession or trade — as, for instance, where he is an army officer — constitutes no breach of the marriage relation unless continued beyond

his rights and duties have suffered no violent change at our modern law. It is for the wife to love, honor, and obey: it is for the husband to love, cherish, and protect. The husband is bound to furnish his wife with a suitable home; to provide, according to his means and condition of life, for her maintenance and support; to defend her from personal insult and wrong; to be kind to her; to see that the offspring of their union are brought up with tenderness and care; and generally to conduct himself, not according to the strict letter of the matrimonial contract, but in its spirit. So long as he does this, his authority is acknowledged at the common law and fairly upheld even to this later date; so that if the wife's wishes and interests clash with his own, she must yield. Lord Stowell observes that the law intrusts the husband not only with a certain degree of care and protection, but also "with authority over his wife. He is to practise tenderness and affection, and obedience is her duty." *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ec. 429. Modern statutes recognizing the wife's separate property or charging family necessities upon the property of both spouses do not deprive the husband of his legal consideration as head of the house. *Tyler v. Sanborn*, 128 Ill. 136; *Yarborough v. State*, 86 Ga. 396. See § 34.

<sup>1</sup> § 35; 1 Fraser, Dom. Rel. 447, 452.

<sup>2</sup> § 35; 2 Kent, Com. 154; 1 Bl. Com. 443.

necessary and reasonable bounds, or accompanied by negligence to provide, while absent, for the maintenance of wife and family. And under some other circumstances cohabitation may be properly allowed to cease for a time without involving the breach of marital obligations.<sup>1</sup>

38. Where redress is sought because one or the other party deserts, this subject is quite commonly considered.<sup>2</sup> In conformity to the world's customs and general principle, it is the wife's actual withdrawal from home which admits the less readily of a justifying explanation, and exposes the pair to scandal.<sup>3</sup> But the husband may be at fault by making the home unfit for an honest wife to occupy with dignity, or by turning his wife out, or even by encouraging her to leave it when it was right that she should remain.<sup>4</sup> It happens often, moreover, that the husband forsakes the home, leaving the wife in it, such withdrawal being rightful or wrongful according to the circumstances.<sup>5</sup> The moral duty of living together involves, doubtless, the reciprocal obligation of making that life agreeable, according to the true status of the married parties; but the extent of the legal duty is not so easily

<sup>1</sup> See 2 Kent, Com. 181; 1 Fraser, Dom. Rel. 240 *et seq.*; *Ib.* 447; *Christian v. Husband*, 17 Martin (La.), 60; *Watts v. Watts*, 160 Mass. 464.

<sup>2</sup> Desertion formerly called for the restitution of conjugal rights, but in these days it furnishes rather a cause of divorce to the injured spouse, not to speak of the enlargement of an abandoned wife's rights and responsibilities, despite the rules of coverture.

<sup>3</sup> *Starkey v. Starkey*, 21 N. J. Eq. 135. As to divorce for desertion, see *Divorce, post*; *Schouler, Hus. & Wife*, Part IX; 1 Bishop, §§ 771-810.

A mere contract of spouses to live apart—apparently as a blind or fraud upon others—is against good morals and cannot be upheld. *Boland v. O'Neill*, 72 Conn. 217.

<sup>4</sup> *McCormick v. McCormick*, 19 Wis. 172.

<sup>5</sup> *McClurg's Appeal*, 66 Penn. St. 366.

Mere frailty of temper on a wife's part, not shown in marked and intolerable excesses, would hardly justify a husband in withdrawing the protection of his home and society. *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; *Johnson v. Johnson*, 49 Mich. 639. Nor even her occasional intemperance. *Heyes v. Heyes*, 13 P. D. 11. But it is held that the wife's violent and outrageous behavior justifies a husband in seeking divorce from bed and board, and, seemingly, in leaving her. *Lynch v. Lynch*, 33 Md. 328.

definable. Upon the point of redress, in fact, codes widely differ; the practical difficulty being, under our laws, that married spouses have little remedy until it comes to the last extremity of divorce.<sup>1</sup> But the duty of cohabitation or adherence is not fulfilled by literal or partial compliance.<sup>2</sup> Thus the refusal of sexual intercourse and the nuptial bed, without good excuse, is a serious wrong which husbands, at all events, are disposed to construe into justifying ground for divorce.<sup>3</sup> Living in the same house, but wilfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage. So, too, a husband who unreasonably withdraws cohabitation from his wife may be deemed guilty of legal desertion, even though he continue to support her.<sup>4</sup> But sexual intercourse, the use of the same chamber, or the occupation of the same bed should be mutually regulated with considerations of health as well as kindly forbearance; and a husband who wantonly abuses his wife so as to inflict needless pain and injury upon her, who regards only his animal cravings and disregards her health and delicate organization, is guilty of legal cruelty.<sup>5</sup> Mere preference, however, for living apart, founded upon agreeable and

<sup>1</sup> See, as to divorce for cruelty or desertion, Schouler, *Hus. & Wife*, §§ 507-523. Manifestations of bad temper on one side must necessarily weaken the duty of adherence on the other; extreme cruelty, or cruel and abusive treatment (which on a husband's part may consist in mental torturing, and not in physical violence alone), is now frequently made a legal cause of divorce; yet, at the same time, mutual forbearance and self-sacrifice are essential to the well-being of every household. Marriage, when rightly considered, works a harmony of character by the constant attrition to which the two natures are exposed; and mere bickerings and misunderstandings ought not to afford legal cause for separation. Ill-treatment, too, followed by a peaceable and on the whole harmonious life together, is not to be brought up long after against the offender. § 36; 49 Mich. 600.

<sup>2</sup> § 36.

<sup>3</sup> *Southwick v. Southwick*, 97 Mass. 327. See *Divorce, post*; 137 Cal. 559 (code).

<sup>4</sup> *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

<sup>5</sup> *Id.*; *Moore v. Moore*, 1 C. E. Green, 275; *Melvin v. Melvin*, 58 N. H. 569; *Mayhew v. Mayhew*, 61 Conn. 233.

convenient considerations, ought not, even though one's health might be the better for it, be indulged in by husband or wife.<sup>1</sup>

39. With a home, there is also a matrimonial domicile of the parties recognized by universal law. And the husband, as *dignior persona*, has the right to fix it where he pleases; the wife's domicile merging in that of her husband.<sup>2</sup> In a genuine sense the domicile of the husband becomes that of the wife, and wherever he goes she is bound to go likewise; not, however, unless his intent be *bona fide* and without fraud upon her person or property rights.<sup>3</sup> In general, where husband and wife live together the domicile of the wife follows that of the husband.<sup>4</sup>

40. Any contract, therefore, which the husband may make with his wife or her friends, before marriage, not to take her away from the neighborhood of her parents, is void. Public policy repudiates all contracts in restraint of such marital rights. There might be circumstances under which such a promise would be reasonable, but at best it can create a moral obligation only. Nor is a secret compact of the parties before marriage that they would not live together a binding

<sup>1</sup> *Morse v. Morse*, 65 Vt. 112.

<sup>2</sup> Grotius says: "*De domicilio constituere jus est marito*." 2 Kent, Com. 181; 1 Fraser, Dom. Rel. 240 *et seq.*, 447. But this applies only to the real domicile of the husband; not to a fictitious place of residence which he may take up for a special purpose, or as an involuntary agent.

<sup>3</sup> 1 Fraser, Dom. Rel. 447, 448; 1 Burge, Col. & For. Laws, 260; Wharton, Conf. Laws, §§ 43-47. See 4 Redf. (N. Y.) 244; *King v. Foxwell*, 3 Ch. D. 518; Schouler, Hus. & Wife, § 60.

In certain cases the wife may perhaps be said to acquire a domicile or legal forum for divorce and similar purposes; see *Divorce, post*, c. 17. Some States now incline to enlarge a separated wife's right of domicile. 43 La. Ann. 140; 129 Ill. 386. But the exception, if it exist, is limited by the just necessity. To a wife living apart from her husband, no separate domicile is conceded for testamentary purposes. 1 Tuck. (N. Y.) 47. Nor does a change of the wife's abode change the husband's or the matrimonial domicile. *Porterfield v. Augusta*, 67 Me. 556; *Scholes v. Murray Iron Works Co.*, 44 Iowa, 190; *Johnson v. Johnson*, 12 Bush (Ky.), 485; *Anderson v. Watt*, 138 U. S. 694.

<sup>4</sup> § 37; 77 Ga. 84.



contract to supersede their open vows at the ceremony.<sup>1</sup> The husband has the right to establish his domicile at any time wherever he pleases, and the wife must follow him through the world.<sup>2</sup> If she refuses to go with him, his own conduct being upright and honorable in the premises, she places herself in the wrong, and while she persists he is not bound to support and maintain her.<sup>3</sup>

41. **As between alien and citizen** it follows that an alien woman marrying with a citizen of the United States becomes, by virtue of such marriage, a citizen also, with the usual capacity as to purchase, descent, and inheritance;<sup>4</sup> and that

<sup>1</sup> *Franklin v. Franklin*, 154 Mass. 515.

<sup>2</sup> *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163; *McAfee v. Kentucky University*, 7 Bush, 135; *Gahn v. Darby*, 86 La. Ann. 70; 93 Mo. App. 99 (her refusal to go is desertion).

<sup>3</sup> *Babbitt v. Babbitt*, 69 Ill. 277; *Morse v. Morse*, 65 Vt. 112.

But with the increasing regard for female privileges has grown up a strong disposition to reduce the husband's right over the matrimonial domicile to a sort of *divisum imperium*. And this difficulty becomes aggravated where the wife has the fortune which supports the family, and the husband has not. The question is not new, whether reasonable exceptions to this rule may not exist; as, for instance, where the husband proposed to take the wife into an enemy's country while war was waging, or on a journey perilous to her life. *Boyce v. Boyce*, 23 N. J. Eq. 337. Such exceptions may be justified, it is generally admitted, on the ground that the wife would be thereby exposed to bodily harm. But whether the apprehension be that of personal violence, or ill health from the fatigue of a journey or the change of climate, little favor seems to have been shown to the wife either at the English or Scotch law, unless the circumstances rendered a change of domicile on her part equivalent to a moral suicide. See 1 Fraser, Dom. Rel. 448; *Keech v. Keech*, L. R. 1 P. & D. 641. At the present day a rule less stringent would doubtless be applied. A husband would not be permitted to remove his wife to some remote and undesirable place for the sake of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not be fixing the matrimonial domicile with honest intent. More than this, there are several late decisions in this country which point to an obligation on the husband's part to show reasonable cause why his wife should follow him when he changes his abode. *Bishop v. Bishop*, 30 Penn. St. 412; *Gleason v. Gleason*, 4 Wis. 64; *Powell v. Powell*, 29 Vt. 148. See 5 Cal. 280; 2 Brews. (Penn.) 511; 43 Ill. App. 370; *Senft v. Carpenter*, 18 R. I. 545.

<sup>4</sup> *Luhns v. Eimer*, 80 N. Y. 171; *Kelly v. Owen*, 7 Wall. (U. S.) 496.

of aliens intermarried, if the husband becomes a naturalized citizen, the wife in like manner is naturalized, even though she has not yet migrated from her native country.<sup>1</sup>

42. The wife's name changes by marriage, in token of her legal subordination. Marriage at our law does not change the man's name, but it confers his surname upon the woman; so that until a decree of divorce, giving a married woman leave to resume her maiden name, goes into full effect, or her widowhood is succeeded by a new marriage and another husband, she goes by her former husband's surname. This is English and American usage. And with this actual marriage name, it would appear that a wife can only obtain another name by reputation.<sup>2</sup>

43. Each spouse is entitled to the society and companionship of the other. Inasmuch as the husband is thus entitled, he may recover his wife from any person who would withhold or withdraw her from him. This is a well-understood principle the world over.<sup>3</sup> And the common law gives him the right to sue for damages all persons who seek to entice her away, or induce her to live apart from him. But in such cases malice and improper motive are always to be considered; and parents and near relatives stand justly on a different footing from strangers or rivals for the woman's affection.<sup>4</sup> So is the previous conduct of the husband towards his wife a material element to be considered; since this, and not the interference of others, may have occasioned the separation. It is one thing to actively promote domestic discord, but quite another to harbor, from motives of kindness and humanity, one who

<sup>1</sup> 7 Wall. 496; *Headman v. Rose*, 63 Ga. 458.

<sup>2</sup> § 41; *Fendall v. Goldsmed*, 2 P. D. 263. But in consideration of the rule that a person has the right to be known by any name he or she chooses, proceedings under the assumed name of a married woman have been upheld after judgment. *Clark v. Clark*, 19 Kan. 522. Obligations incurred by or with third parties in her maiden name are also held mutually binding. *Lane v. Duchac*, 73 Wis. 646; 96 Cal. 609.

<sup>3</sup> 1 Fraser, Dom. Rel. 240, 241.

<sup>4</sup> § 41; 5 Johns. (N. Y.) 196; *Wright* (Ohio), 636; 47 Barb. 120; *Fratini v. Caslini*, 66 Vt. 273; *Rinehart v. Bills*, 82 Mo. 534; *Bennett v. Smith*, 74 Mo. 636; 98 Mo. App. 562.

seeks shelter from the oppression of her own lawful protector. A just necessity for the intervention, honest motive, honest advice, with the intent, not of profiting personally by the separation or divorcement of the pair, but so as to restore harmony or do justice, should be a proper defence against the husband's suit.<sup>1</sup>

44. As to alienation of a husband's affections, differences of sex may account for a denial of the enticement suit to the wife, though her right to her husband's society is unquestionable. Woman claims protection where man acts for

<sup>1</sup> § 41; *Tasker v. Stanley*, 153 Mass. 148.

Yet such conduct, whatever the motive, is, on the part of male outsiders, exceedingly perilous, generally open to misconstruction, and never to be encouraged. They should leave the parties to their lawful remedies against one another. With parents it is different. There are several cases in the American reports where a father is not only held to be absolved from liability for sheltering his daughter, who has fled from a drunken and profligate husband, but even stimulated to do so. "A father's house," says Chancellor Kent, "is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum." *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196. See also *Wright* (Ohio), 636; 88 Ky. 403; 21 Barb. 439; 20 N. Y. Supr. 204; *Payne v. Williams*, 4 Baxt. 583; *White v. Ross*, 47 Mich. 172; 49 Mich. 529; 89 Tenn. 478; 1 Burge, Col. & For. Laws, 238. For a curious case, involving enticement and an agreement between the husband and the offender, see *Barbee v. Armstead*, 10 Ired. (N. C.) 530. § 41. But this does not justify even a parent in hostile interference against the husband: for the latter's rights are still superior; and the father must give up his daughter and the marriage offspring, whenever she wishes to return, unless the proper tribunal has decreed otherwise; though he might, probably, by fair arguments urged to promote her true good, seek to dissuade her from returning. The parent ought to be free to give good advice honestly, at all events, to a married daughter who seeks it in distress. The legal doctrine seems to be this: that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control, — the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation; but that otherwise his remedy is complete against all persons whomsoever, who have lent their countenance to any scheme for breaking up his household.

himself; and there is some contradiction of the cases on this point.<sup>1</sup> With the increase of divorce facilities, however, the general principle of suing for enticement may part with some of its force even for a husband.<sup>2</sup> The right of action for criminal intercourse with one's wife rests on stronger ground than mere enticement.<sup>3</sup> And aside from debauchery or entice-

<sup>1</sup> § 41.

Great interest is taken by women in this subject, according to the latest American decisions (1884-1905). Partly upon consideration of the rules of common law, but still more because of the development of equal companionship in marriage under the policy of modern legislation, the wife has been permitted to sue other persons for wrongfully enticing away or seducing her husband, by the rule of various States in recent instances. *Haynes v. Nowlin*, 129 Ind. 581; 133 Ind. 386; *Foot v. Card*, 58 Conn. 1; *Seaver v. Adams*, 86 N. H. 142; *Warren v. Warren*, 89 Mich. 123, with citations; *Price v. Price*, 91 Iowa, 693; *Bennett v. Bennett*, 116 N. Y. 584; 59 N. Y. S. 341; 200 Penn. St. 70; *Betser v. Betser*, 186 Ill. 537. Codes affect the rule: *Id.*; 92 Md. 138; 72 Vt. 334. And such suits have been maintained not only against rival women but even against a husband's parents who induce separation. But the rival woman should be shown to have enticed knowingly and directly, so as actively to interfere with a wife's privileges. *Waldron v. Waldron*, 45 Fed. (U. S.) 315. Cf. 97 Conn. 135 (action against woman adulterer though husband seduced). Where the wife sues the husband's parents, etc., good motive is still a defence, though reckless enticement without due investigation may be presumed malicious. 32 S. E. 320; 94 Me. 280; 172 N. Y. 438.

In the wife's suit the basis is loss of society, and alienation of affection is only an aggravation. *Evans v. O'Connor*, 174 Mass. 287. A wife cannot, in this State, sue a third person for merely alienating her husband's affection; adultery must be alleged, or procuring or enticing or harboring or secreting him. 174 Mass. 366. Exemplary damages have been ruled where the injury was wanton and malicious. 45 Fed. (U. S.) 315. Other States, however, oppose this whole doctrine, which at the old common law was at least undeveloped. *Doe v. Roe*, 82 Me. 503; 92 Me. 193; *Duffies v. Duffies*, 76 Wis. 374; *Hester v. Hester*, 88 Tenn. 270; 69 N. J. L. 490.

<sup>2</sup> A wife having just cause for separation or divorce may be afforded shelter by even a stranger, acting in good faith. *Modisett v. McPike*, 74 Mo. 636. And see *Tasker v. Stanley*, 153 Mass. 148.

<sup>3</sup> *Michael v. Dunkle*, 84 Ind. 544; 2 Ld. Raym. 809; 7 Mod. 78; 2 Chitty, Pleading, 855. The husband may sue, thus, for the loss of his wife's society, if he has not renounced his marital rights, although such criminal converse was without her consent, and caused no actual

ment, the husband's action lies for the alienation with bad motives of his wife's affections.<sup>1</sup>

45. The husband's duty to render support will be considered later in treating of the wife's necessities, when it will also appear that our married women's acts tend to certain changes, not so much of principle as of application, by extending the liability for family supplies to property such as wives now hold to their separate use.<sup>2</sup> The general rule of law is that the husband, the spouse who holds and fills the purse, is bound to provide the family support and means of living. The style of support requisite — of lodging, food, clothing, medical attendance, and the like — is such as befits his means and condition of life. A wife is not usually justified in leaving her husband and the common home so long as the husband treats her kindly, and provides to the extent of his ability, even though retrenchment in the style of living may be needful from one cause or another.<sup>3</sup>

loss of service. *Bigaouette v. Paulet*, 134 Mass. 123; *Cross v. Grant*, 62 N. H. 675. Cf. *Neilson v. Brown*, 13 R. I. 651. That the plaintiff and his wife were divorced before the suit, is no defence; nor can the wife give such consent to the seduction as will bar the husband's right of action. *Wales v. Miner*, 89 Ind. 118; 101 Ind. 160. A husband may attack the adulterer whom he finds engaged in the criminal act, and the latter has no right to defend himself with a deadly weapon. *Drysdale v. State*, 83 Ga. 744. As to husband's connivance, see 109 Iowa, 288; 114 Wis. 550. As to damages against a man who debauches one's wife, the man's ignorance of the marriage, or the wife's improper advances to him, go in mitigation of damages, but the suit is not barred, since crime and a wrong existed. (1900) Prob. 297; 200 Penn. St. 58.

The husband sustains a wrong by his wife's seduction, aside from the loss of her society; and hence may sue for criminal conversation even though they lived apart at the time of the seduction. (1899) Prob. 195; see 208 Ill. 52.

<sup>1</sup> *Rinehart v. Bills*, 82 Mo. 534.

<sup>2</sup> § 45.

<sup>3</sup> *Skean v. Skean*, 33 N. J. Eq. 148; *James v. James*, 58 N. H. 266; 76 Iowa, 638. It is his habitual misconduct in this respect, rather than some isolated instance, which should be chiefly regarded in a divorce for his neglect. *Jenness v. Jeuness*, 60 N. H. 231. Pecuniary inability to support, especially when proceeding from no unkindness or indifference

46. The wife's obligation to render family services is at least co-extensive with that of the husband to support her in the family; these services and the comfort of her society being in fact the legal equivalent of such support.<sup>1</sup> Hence, as it is held, the wife of an insane man cannot claim special compensation out of his estate for taking care of him, even though such were the express contract between herself and the guardian.<sup>2</sup> Nor can a wife found a suit for wages promised by her husband, upon the marital legislation giving her a right to her general earnings.<sup>3</sup> Doubtless it would be bad policy to permit marital services on either side, however meritorious, to become a matter for money recompense, and to strike a just balance is impossible.<sup>4</sup>

47. The right of chastisement and correction is sometimes considered. Though either spouse may be the more dangerous companion, because of greater physique, daring, recklessness, or depravity, nature gives to man the usual advantage. In a ruder state of society the husband frequently maintained his authority by force; and the old common law recognized the right of moderate correction, which, according to Blackstone, was deemed a privilege by the lower orders in his day.<sup>5</sup>

on his own part, is held no ground for a wife's divorce. *Bruner v. Bruner*, 70 Md. 105; *Jewett v. Jewett*, 61 Vt. 370. Nor even is his saving and frugal disposition, where he could afford to be liberal. *Runkle v. Runkle*, 96 Mich. 493. But reducing the wife's comforts needlessly, and especially if from sinister motives, she may justly complain of, and criminal prosecution with recognizance is found to aid the common law of the wife's power to pledge credit in compelling a competent husband to support his family. *Boyce v. Boyce*, 23 N. J. Eq. 337; *People v. Pettit*, 74 N. Y. 320; *Schouler, Hus. & Wife*, § 67. § 45. And see *post*.

<sup>1</sup> *Randall v. Randall*, 37 Mich. 563, per Cooley, J.; *Grant v. Green*, 41 Iowa, 88; *Stimson*, § 6401.

<sup>2</sup> *Grant v. Green*, 41 Iowa, 88.

<sup>3</sup> *Swetzer v. Kee*, 146 Ill. 577; *Blaechinska v. Howard Mission*, 130 N. Y. 497.

<sup>4</sup> § 43.

<sup>5</sup> 1 Bl. Com. 444, 445. In 100 Mass. 365, *Chapman, C. J.*, states the old form of the writ of *supplicavit* for protection of the wife against her husband; viz., that the husband should not do other damage to her person "than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully."

The civil law went still further, permitting, in certain gross misdemeanors, violent flogging with whips and rods.<sup>1</sup> But since the time of Charles II. the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable or indeed obsolete at the present day. The rule of persuasion has superseded the rule of force.<sup>2</sup> The wife, moreover, should not chastise her husband; nor provoke harsh treatment by her own violence, foul abuse, and misconduct.<sup>3</sup> But either spouse may use force in self-defence. And the husband may restrain his wife from acts of violence against others as well as himself in person or property, — most certainly wherever the law makes him answerable in damages for her misbehavior;<sup>4</sup> and may prevent her unwarrantable interference with the due exercise of his parental authority.<sup>5</sup>

48. The husband's right of gentle restraint over the wife's person rests upon better authority than that of chastisement. Such a right, however, depends still upon the proposition that

<sup>1</sup> *Flagellis et fustibus acriter verberare uxorem*. See 1 Bl. Com. 445; § 44.

<sup>2</sup> Few cases of importance are to be found on this subject. In England, where a wife sought divorce from bed and board for cruelty, it was shown that the husband had spit upon her, pushed and dragged her about the room, and once slapped her face; and upon this proof the divorce was granted. *Saunders v. Saunders*, 1 Rob. Ec. 549. The right to inflict corporal punishment upon the wife has never been favored in this country, and its exercise would now generally justify proceedings for a divorce. Indeed, our latest State decisions emphatically deny that the right longer exists either in England or this country. *Gholston v. Gholston*, 31 Ga. 625; 115 Ga. 578; *Pillar v. Pillar*, 22 Wis. 658; *Edmonds' Appeal*, 57 Penn. St. 232; *Fulgham v. State*, 46 Ala. 143; *Gorman v. State*, 42 Tex. 221; 92 Ky. 452. And see *State v. Oliver*, 70 N. C. 60, overruling 1 Phill. (N. C.) 453. Corporal chastisement is not justified, though the wife be drunk or insolent. *Commonwealth v. McAfee*, 108 Mass. 458; 1 Swab. & T. 601. Divorce has been granted where a husband repeatedly threatened to strike and kill his wife. 60 Iowa, 397.

<sup>3</sup> *Knight v. Knight*, 31 Iowa, 451; *Prichard v. Prichard*, 3 Swab. & T. 523; *Trowbridge v. Carlin*, 12 La. Ann. 882.

<sup>4</sup> 2 Kent, Com. 181; *People v. Winters*, 2 Parker (N. Y. Cr.), 10; 1 Bl. Com. 445; *Richards v. Richards*, 1 Grant (Penn.), 389.

<sup>5</sup> § 44.

the husband is *dignior persona*. And its exercise is often to be justified in the courts on the same ground as force: that the husband must answer to others for his wife's conduct. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty. The later expression of Kent is that he may resort to "gentle restraint."<sup>1</sup> So, too, the husband, by virtue of his marital authority over his own household, might be allowed, if not by physical force, at least by moral coercion, to regulate his wife's movements so as to prevent her from going to places, associating with people, or engaging in pursuits, disapproved by himself on rational grounds. This doctrine has been asserted in England; and Mr. Fraser carries it to the extent of forbidding her relatives to visit her; "for," he observes, "though the wife may be very amiable, her connections may not be so."<sup>2</sup> But this rule is to be laid down with great caution, and it may be considered especially unpopular in America.<sup>3</sup>

<sup>1</sup> 2 Kent, Com. 181; 1 Bl. Com. 445; § 45. Strong instances for the exercise of this right occur where the wife has eloped with a libertine, and the husband wishes to bring her home; or where she purposes an elopement, and he seeks to prevent it; or, perhaps, where she goes recklessly into lewd company. So strongly does the common law detest conjugal unfaithfulness, that the husband who kills his wife or her paramour in the act of adultery is only guilty of manslaughter. See *Regina v. Kelly*, 2 Car. & K. 814; also 83 Ga. 744. Restraint may also be justified where the wife becomes insane, threatens the husband with danger, or wantonly destroys his property. 8 Mod. 22; 1 Stra. 477; *In re Price*, 2 Fost. & F. 268; *State v. Craton*, 6 Ire. 164. And see 1 Bishop, Mar. & Div. § 756.

<sup>2</sup> 1 Fraser, Dom. Rel. 459. This observation was made by Lord Stowell in *Waring v. Waring*, 2 Hag. Con. 153; 1 Eng. Ec. 210.

<sup>3</sup> The husband's right must not be exercised needlessly nor with undue severity; and the moment the wife, by her return to conjugal duties, makes the restraint of her person unnecessary, such restraint becomes unlawful. Coleridge, J., in *Cochrane, Re*, 8 Dowl. P. C. 631.

Our modern doctrine is that force, whether physical or moral, systematically exerted to compel the submission of a wife in such a manner, and to such a degree, and during such a length of time, as to injure her health and threaten disease, is legal cruelty. *Kelly v. Kelly*, L. R. 2 P. & D. 31; *Bailey v. Bailey*, 97 Mass. 373. See Schouler, *Hus. & Wife*, §§ 507-510. And in quite recent instances where the doctrine of the husband's right to physically constrain his wife has come up, the court



49. It follows that the general regulation of a household is the privilege of the husband, who is its lawful head. The wife in this respect is to be viewed as his representative or executive officer, properly intrusted with domestic details, and particularly with the supervision of female menials and their work. Husbands are sometimes blameworthy in the course of such regulation for pettiness, meanness, and inconsiderateness towards their wives. And yet households differ, and legal cruelty cannot readily be predicated of such conduct further than that, in divorce suits, misbehavior of this kind is frequently alleged in aggravation of actual cruelty otherwise practised, and so as to give body to the latter charge. It cannot be called cruelty or a breach of marital duty justifying legal interference, for a married householder, however large his establishment, to take the settlement of the little bills upon himself, or the hiring and discharge of the servants.<sup>1</sup> As to the question how far the wife is bound to observe the husband's directions in entertainment, the choice of visitors, the arrangement of the rooms, and so on, modern precedent is scanty.<sup>2</sup>

has pronounced practically against such a general right on his part; thus leaving him without the legal means of compulsion by imprisonment, but remitting him rather to divorce remedies. *Reg. v. Jackson*, (1891) 1 Q. B. 671; *Buckingham v. Buckingham*, 81 Mich. 89; § 45.

<sup>1</sup> *Evans v. Evans*, 1 Hag. Con. 35, 115.

<sup>2</sup> The wife is expected to conform to her husband's habits and tastes, even to his eccentricities, provided her health be not seriously endangered by so doing; and though he should restrict the calling list to a certain set agreeable to himself alone, or interdict intercourse with her family, or prevent her from paying a visit to his own relatives, all of which we may well presume to be unkind and unreasonable, yet this alone is not sufficient ground for divorce. *Neeld v. Neeld*, 4 Hag. Ec. 263; 1 Hag. Ec. 773; 2 Hag. Con. 153; *Shaw v. Shaw*, 17 Conn. 189; *Fulton v. Fulton*, 36 Mo. 517. Nor would divorce be granted simply because he had forbade her to attend a particular church of which she was a member. *Lawrence v. Lawrence*, 3 Paige (N. Y.), 267. See 74 Tex. 414.

A wife cannot stipulate for giving any one a home in the matrimonial household aside from her husband's wishes. 78 Mich. 17. But she can license one to enter while her husband is away. 31 Neb. 540.

Whether the husband can allege misconduct against his wife or obtain redress on his own part, if she rebels against oppressive discipline of this

50. The custody of children belonged to the father at common law, and Blackstone observes: "A mother, as such, is entitled to no power, but only to reverence and respect."<sup>1</sup> But by an English statute of 1839, the court of chancery was permitted to interfere and award the custody of children to such parent as might be deemed most suitable; its special object being to enable married women, when ill-treated by their husbands, to assert their rights without the fear of being separated from their offspring.<sup>2</sup> In this country the tendency of legislation is to place the wife upon a more equal footing with her husband in this respect, so that husband and wife together shall have in their children a joint interest and control, which the courts are to regard as distinct only when the welfare of these tender beings makes judicial intervention necessary; in which event the child's own good may be treated as even paramount to the wish of either parent.<sup>3</sup>

51. The remedies of spouses against each other for breach of matrimonial obligations are confessedly imperfect. Since no legal process can safely be enforced to compel husband and wife to live together, against the will of either, so the peace of society forbids that they should sue one another in damages for marital grievances. Here again is marriage *sui generis*, and not like other contracts. But the failure of the one to perform recognized duties may sometimes absolve the other from certain corresponding obligations. Thus, if the wife leaves her home without justifiable cause, the husband may refuse to support her.<sup>4</sup> If the husband is cruel, or makes

kind, is extremely doubtful. Whims and caprices of the husband, submission to which endangers the wife's health, need not be obeyed, and may even be relieved against as legal cruelty; nor need the wife submit perhaps to constraint upon such religious worship as her conscience dictates; for the husband's right to manage his house and wife must doubtless be understood to have rational limits. § 46; *Kelly v. Kelly*, L. R. 2 P. & D. 31; 1 Bishop, § 758.

<sup>1</sup> 1 Bl. Com. 453.

<sup>2</sup> 2 & 3 Vict. c. 54; *Warde v. Warde*, 2 Ph. 786.

<sup>3</sup> See *post*, Parent & Child, c. 3, where the subject is appropriately considered at length.

<sup>4</sup> 2 Kent, Com. 147; 1 Mod. 124; 1 Bl. Com. 443; *Peaks v. Mayhew*, 94 Me. 571.

his home unfit for a chaste woman to live in (which is a species of cruelty), the wife may leave and compel him to support her elsewhere.<sup>1</sup> Such effect of the law is naturally that the strained bonds pull apart until they break. In general, the violation of marital obligations is effectually punished, not by compelling them, but by putting an end to the relation altogether; a confession that government through the courts proves unequal to the task of protecting and upholding the marriage union.<sup>2</sup> And it is in the modern proceedings for divorce that we now find the subject of marital obligations most frequently discussed, with, however, a bias towards construction of the local divorce code; for such local codes greatly differ.<sup>3</sup>

52. Each spouse as a criminal stands amenable to the law. We shall find the doctrine of coverture affecting the liability of a married woman for her fraud or injury, so that the hus-

<sup>1</sup> 3 Bing. 127; 96 Ill. App. 242. And see c. 3, as to wife's necessities.

<sup>2</sup> See 1 Bishop, Mar. & Div. § 771; 1 Fraser, Dom. Rel. 452; Adams v. Adams, 100 Mass. 365; Briggs v. Briggs, 20 Mich. 34; Schouler, Hus. & Wife, §§ 72-77.

<sup>3</sup> § 48. It is worth considering whether more effort might not be made to sustain conjugal rights by judicial intervention in the direction of reconciling spouses to one another, requiring the offending party to give bonds, or the like; and this is all that the old English suit for restitution of conjugal rights (never recognized in the United States) can now amount to.

Husband and wife may be indicted for assault and battery upon each other. *State v. Mabrey*, 64 N. C. 592; *Whipp v. State*, 34 Ohio St. 87; *Tucker v. State*, 71 Ala. 342. See 55 A. 1010 (husband fined or whipped). This is a means of redress not unfrequently sought against cruel husbands, especially among those of low surroundings, where drunkenness is common, and religion treats divorce for cruelty with disfavor; and a husband who beats his wife inexcusably may be convicted of this offence. § 48; *State v. Oliver*, 70 N. C. 60. Cf. *State v. Driver*, 78 N. C. 423. So, too, the offending spouse may be bound to keep the peace. For unreasonable and improper checks upon her liberties, the wife may have relief on *habeas corpus*; but this writ is not available for the husband to secure the person of his wife, voluntarily absenting herself from his house. *Ex parte Sandiland*, 12 E. L. & Eq. 463. See *Adams v. Adams*, 100 Mass. 365, as to the old writ of *supplicavit* formerly issued for protection of the wife against her husband; *Reg. v. Jackson*, (1891) 1 Q. B. 671; 81 Mich. 89.

band must respond to others in damages for her.<sup>1</sup> But here the private wrong and the public wrong stand contrasted, for the immunity of the wife does not extend to criminal prosecutions. As Blackstone observes, the union is only a civil union;<sup>2</sup> or, to come more to the point, it would be cruel and unjust to punish one person for the crime of another, or even to compel the two to bear the penalty together; while it would be impolitic, as well as unjust, to allow any relation which human beings, morally responsible, might sustain with one another, to absolve either from public accountability. Here coverture as a theory contradicts itself by leaving the wife answerable alone for her crimes, just as a single woman. The utmost the law can do is to furnish a presumption of innocence in her favor in certain cases where the coercion of her husband may be reasonably inferred.<sup>3</sup> The presumption that in a crime committed by the wife in her husband's presence, the wife acts under the husband's coercion, may in any case be repelled by suitable proof; and when it is, the wife, as one acting *sui juris*, must be held responsible for the wrong done by her in her husband's company. Both husband and wife may, therefore, be indicted and convicted of any crime where it appears that both were guilty of the offence and the wife was not coerced.<sup>4</sup>

<sup>1</sup> See *post*, c. 4.

<sup>2</sup> 1 Bl. Com. 443.

<sup>3</sup> § 49.

This indulgence of presumed innocence is carried so far as to excuse the wife from punishment for theft, burglary, or other civil offences "against the laws of society," when committed in the presence or by the command of her husband; but not so as to exculpate the wife for moral offences. For *mala prohibita*, it is said, she is not punishable; for *mala in se* she is. Such a distinction is variable and somewhat shadowy; the line seems to be drawn more wisely, if at all, between such heinous crimes as murder and manslaughter, and the lighter offences. 2 Kent, Com. 150; 4 Bl. Com. 28, 29, and Christian's notes; § 50. And the better opinion is, decidedly, that at the most coercion is only a presumption, which may be rebutted by evidence to the contrary. 2 Kent, Com. 150; *State v. Parkerson*, 1 Strobb. (S. C.) 169; *Uhl. v. Commonwealth*, 6 Gratt. 706; 19 Barb. 321; cases *infra*.

<sup>4</sup> § 50; *Goldstein v. People*, 82 N. Y. 231; *Mulvey v. State*, 43 Ala. 316; *State v. Potter*, 42 Vt. 495; *People v. Wright*, 38 Mich. 744; *State*

**53. Concerning offences against a spouse's property.** While public policy forbids that either spouse should molest the person of the other with impunity,<sup>1</sup> our law pursues a distinction as to the property of a spouse while cohabitation lasts. Accordingly, it is well established that the wife cannot be found guilty of stealing the goods of her husband, inasmuch as she resides with him and has possession of the goods by virtue of the marriage relation.<sup>2</sup> And as to the husband, whose legal possession and control of his wife's property during wedlock is far stronger, it is held that, not even upon the ground that a certain building was his wife's separate property, can he be convicted of arson for setting it on fire.<sup>3</sup> But where a third person, though at the wife's instigation,

*v. Camp*, 41 N. J. L. 306; 42 Fed. (N. Y.) 317. In most of the latest cases where the wife is indicted, the presumption of coercion has been regarded as something to be easily rebutted, especially in that numerous class of cases which relate to the illegal sale of liquors, a business in which married women frequently engage understandingly. See *State v. Cleaves*, 59 Me. 298; 99 Mass. 442; 126 Mass. 462. And where the crime is heinous, and the presence and command of the husband do not concur, a jury may readily find the wife independently guilty. See *Miller v. State*, 25 Wis. 384 (conspiracy to commit a robbery with the use of force). *People v. Wright*, 38 Mich. 744. Woman shrinks naturally from committing the bolder crimes, yet a woman may be principal in a murder and liable accordingly. *Bibb v. State*, 94 Ala. 31. A wife who committed larceny by her husband's bare command, when he was not present, has been held liable therefor; and our present tendency is to refuse exculpation to the wife unless the husband commanded and was near enough besides to exert directly his marital influence upon her participation in accomplishing the particular crime. *Seiler v. People*, 77 N. Y. 411; *State v. Camp*, 41 N. J. L. 306; *State v. Potter*, 42 Vt. 495; *Commonwealth v. Munsey*, 112 Mass. 287; *Edwards v. State*, 27 Ark. 494. See further, *Schouler, Hus. & Wife*, §§ 76-78; 18 R. I. 535, 537; 133 Mass. 381 (keeping a disorderly house); 53 W. Va. 613; 97 N. Y. 126 (forgery); 162 Mo. 253.

<sup>1</sup> See 51, *e. g.*, as to remedies for assault and battery. And cf. 54.

<sup>2</sup> § 51. *Queen v. Kenny*, 2 Q. B. D. 307; *Lamphier v. State*, 70 Ind. 317. And see 86 Ga. 773.

<sup>3</sup> *Snyder v. People*, 26 Mich. 106. Modern American statutes frequently change this last rule. § 51. In *Beasley v. State*, 138 Ind. 552, a husband was held criminally answerable for larceny of his wife's property.

forcibly removes from the house goods belonging to the husband, the latter may sue him for the tort.<sup>1</sup>

54. In transfers, contracts, suits, etc., there is a mutual disability at the common law, agreeably to the theory of this relation. Husband and wife cannot make gifts or sales to one another during coverture, though the same parties might have done so before and in contemplation of marriage. Nor can they in other respects contract or enter into covenants with one another. Nor can one sue the other.<sup>2</sup> But, as we shall later see, equity and modern legislation introduce a different principle. This disability of the spouses to sue one another is not merely the technical one that, under the old procedure, husband and wife must join, but is founded on the principle that husband and wife are one.<sup>3</sup> There is sound policy, moreover, in discouraging the pair from making of their matrimonial bickerings a cause of action for damages against one another. However it may be practically at this day, therefore, as to actions of contract, or proceedings in equity, arising out of their distinct property relations, the wife (aside from local legislation) has no cause of action in damages against her husband for a pure tort committed upon her person during the marriage relation, such as assault or false imprisonment. And as the chief objection to such actions is fundamental to the peace and privacy of the relation and not merely one of procedure, the fact that she has since procured a divorce will not enable her to bring such a suit.<sup>4</sup>

55. The disqualification of husband and wife to testify as

<sup>1</sup> *Burns v. Kirkpatrick*, 91 Mich. 364, where the offender was the wife's brother.

<sup>2</sup> § 52; *Lannoy v. Duchess of Athol*, 2 Atk. 448; 1 Bl. Com. 442; 2 Kent, Com. 129. The married women's acts in this country have changed the common law greatly as to the mutual right of suit. And see, as to modern rules in marital transfers, c. 14, *post*.

<sup>3</sup> *Blackburn, J.*, in *Phillips v. Barnet*, 1 Q. B. D. 436.

<sup>4</sup> *Phillips v. Barnet*, 1 Q. B. D. 436; *Abbott v. Abbott*, 67 Me. 304. A wife cannot prosecute her husband for an assault upon the person of their daughter. *People v. Westbrook*, 94 Mich. 629. Nor can one spouse sue another for libel, slander, etc. 16 Q. B. D. 772.

witnesses in the courts for or against one another is one of the most important of the mutual disabilities of the marriage state. Blackstone places this prohibition on a technical ground, — unity of the person.<sup>1</sup> He also suggests interest as another ground for the rule; and this doubtless is a good one. But a more solid reason than either is that of public policy.<sup>2</sup> So unyielding is this rule that mutual consent will not authorize the breach of it.<sup>3</sup> Whether the suit be civil or criminal, in law or at equity, it matters not. Form yields to substance in procedure, for the sake of excluding such testimony. And after coverture has terminated by death or divorce, still the prohibition lasts as to all which took place while the relation existed.<sup>4</sup> The disability of the husband is in this respect as great as that of the wife.<sup>5</sup>

<sup>1</sup> If they testify in behalf of one another, they contradict the maxim, "*Nemo propria causa testis esse debet*;" and, if against one another, that other maxim, "*Nemo tenetur se ipsum accusare*." 1 Bl. Com. 443.

<sup>2</sup> "The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband." 1 Greenl. Evid. § 254. See also 2 Kent, Com. 178-180, to the same effect. But cf. *Peaslee v. McLoon*, 16 Gray (Mass.), 488.

<sup>3</sup> § 53; 1 Greenl. Evid. § 340; Lord Hardwicke, in *Cas. temp. Hardw.* 264; 4 T. R. 679; 2 Kent, Com. 179.

<sup>4</sup> § 53; 6 East, 192; *Doker v. Hasler*, Ry. & M. 198; *Stein v. Bowman*, 13 Pet. (U. S.) 223; 1 Greenl. Evid. § 337. See also *Croze v. Rutledge*, 81 Ill. 266; *Wood v. Shurtleff*, 46 Vt. 525; 89 N. C. 559; 78 Ala. 425; *Maynard v. Vinton*, 59 Mich. 139; 1 Barb. 392.

<sup>5</sup> § 53. And see *Turner v. Cook*, 36 Ind. 129; *Richards v. Burden*, 31 Iowa, 305; 51 Ill. 110; *Wade's Succession*, 21 La. Ann. 343. The wife is not competent to prove an *alibi* for her husband in a criminal prosecution. *Miller v. State*, 45 Ala. 24.

The rule applies alike to evidence of declarations made by husband and wife for or against one another, and to their testimony in person. 1 Greenl. Evid. § 341; 6 T. R. 680; 7 T. R. 112; *Brown v. Wood*, 121 Mass. 137. Nor is a wife a competent attesting witness at common law to a will which contains a devise to her husband. See *Sullivan v. Sullivan*, 106 Mass. 474, and cases cited (a rule sometimes changed). Nor is one claiming, as widow, the right to administer, competent to establish her marriage. *Redgrave v. Redgrave*, 38 Md. 98. Nor are the spouses com-

56. Important statutory changes in the law of evidence have been introduced in England and the United States, so as to permit interested persons to testify in their own suits. Where the old doctrine prevails, the exclusion of the husband, by reason of direct interest, operates to exclude his wife likewise.<sup>1</sup> So the husband cannot be a witness in a controversy respecting his wife's separate estate, though in respect to other parties concerned he might be competent;<sup>2</sup> and this, too, is changed by legislation.<sup>3</sup> On the whole,

petent witnesses for or against one another in a suit for divorce on the ground of adultery, nor in proceedings for bigamy against one of them. *Marsh v. Marsh*, 29 N. J. Eq. 396; 41 N. Y. Supr. 501. But see *State v. Bennett*, 31 Iowa, 24. And it is said that the law guards the marital confidence of silence as well as that of communication. *Goodrum v. State*, 60 Ga. 509.

This rule of exclusion applies only to persons occupying the *bona fide* relation of husband and wife; not, of course, to a mistress, or parties consciously in immoral cohabitation. But at the same time the courts lean kindly towards *prima facie* marriages, and make no rigid investigation. 1 Greenl. Evid. § 339; *Hampton v. State*, 45 Ala. 82 (wife of a freedman). Cf. *Dennis v. Crittenden*, 42 N. Y. 542; *Mann v. State*, 44 Tex. 642; *Hill v. State*, 41 Ga. 484; *Rickerstriker v. State*, 31 Ark. 207; 28 La. Ann. 279. See further, Schouler, *Hus. & Wife*, § 83. The policy of the rule is evidently to treat as privileged communications all that passes between persons supposing themselves lawfully married, and at all events not to prejudice the rights of the innocent party to an invalid marriage; but the rule has not always been carried to such an extent. Some exceptions exist to the rule, founded mainly on considerations of public policy. § 53; 1 Greenl. Evid. § 343. One spouse may testify as to a criminal assault by the other. 63 Md. 123; 16 Q. B. D. 772; 42 La. Ann. 927; 187 Penn. St. 255; 94 Ala. 53; 43 Tex. 616.

<sup>1</sup> 1 Greenl. Evid. § 341; 1 P. Wms. 610; § 53.

<sup>2</sup> 1 Burr. 424, per Lord Mansfield.

<sup>3</sup> The English Evidence Act of 1853, 16 & 17 Vict. c. 83 (which has been substantially copied in most parts of this country) renders husbands and their wives competent and compellable witnesses for each other, except in criminal cases and in cases of adultery; but neither shall be compelled to disclose communications made during marriage. In various States a spouse, under statute, may now be a competent witness to a greater or less extent with reference to a wife's separate property. 66 Penn. St. 242; 61 Ill. 263; 54 Ga. 623; 75 Ill. 159; 131 N. Y. 314. As where the husband dealt with the wife's separate property as her agent. 54 Mo. 347; 39 Wis. 370. But cf. 44 Ala. 227. Statutes allow of recip-



the prevailing tendency of late years in both England and America has been to regard domestic confidence or the bias of a spouse as of lesser consequence in comparison with the public convenience of extending the means of ascertaining the truth in all causes; such facilities being increased, it is believed, by hearing whatever each one has to say, and then making due allowance for circumstances affecting each one's credibility. By the modern enlargement of the wife's separate contract and property relations, moreover, the spouses are presented, not so constantly as partakers of one another's confidence, but rather as persons having adverse interests to maintain, or else as principal and agent.<sup>1</sup> Yet there is still reluctance felt to disturbing by legislation the harmony of the marriage state so far as to expose its secret confidences.<sup>2</sup>

rocal testimony on matters of their mutual property concerns, or where one transacts as the agent of the other. 55 Mich. 362; 84 Mo. 442. See further, § 53; Schouler, *Hus. & Wife*, § 85 and *n.*, where the modern cases are collated. And see local statute in any case.

<sup>1</sup> A statute providing for the admission of interested parties as witnesses does not *per se* remove the disqualification of husband and wife. *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Gibson v. Commonwealth*, 87 Penn. St. 253; *Schultz v. State*, 32 Ohio St. 276; *Gee v. Scott*, 48 Tex. 510. Concerning testimony as to conversations held by married parties when they were alone, the rule of the common law, encouraging their confidence, is presumed to be unchanged unless the statute is positive to that effect. 114 Mass. 424; *Brown v. Wood*, 121 Mass. 137; 27 N. J. Eq. 311; *Stanford v. Murphy*, 63 Ga. 410; 32 W. Va. 14; 77 Iowa, 263.

Where both husband and wife are interested in the result of a suit, neither is a competent witness. 82 Va. 484; *De Farges v. Ryland*, 87 Va. 404. Admissions of one spouse adversely interested ought not to affect the right of the other. *Fitzgerald v. Brennan*, 57 Conn. 511. Where one is incompetent to testify, the other is also incompetent. *Bitner v. Boone*, 128 Penn. St. 567. And see 28 Fla. 511. Where one marital party testifies against the other, under statute, cross-examination must be freely permitted. 77 Penn. St. 20; 53 Cal. 425. The Michigan statute provides that a husband shall not be examined for or against his wife except, *inter alia*, where her interest is opposed to his in a question of property derived through him. 85 Mich. 380.

<sup>2</sup> See *Upson, J.*, in *Sessions v. Trevitt*, 39 Ohio St. 259, 268. And see *Robb's Appeal*, 98 Penn. St. 501; 43 Ark. 307. Under a New York statute of 1876, one spouse may be examined in a criminal trial as a witness on behalf of the other, but cannot be compelled to testify; and if

As to matters spoken not confidentially but coming by means equally accessible to third persons it may be different.<sup>1</sup>

one is not called by the defendant, that fact may be commented on to the jury. 92 N. Y. 554. See further, as to competent, but not compellable testimony, *Stickney v. Stickney*, 131 U. S. 277; 44 Minn. 159.

<sup>1</sup> *Bigelow v. Sickles*, 75 Wis. 427.

### CHAPTER III.

#### EFFECT OF COVERTURE UPON WIFE'S DEBTS AND CONTRACTS.

57. The property rights of married women are restrained at the common law. The husband yields to his wife no participation whatever in his own property, whether acquired before or during the continuance of the marriage relation, except a certain right of inheritance to his goods and chattels, of which he can generally deprive her by his will and testament, and also dower in his real estate, which is her only substantial privilege. In return for this, she parts with all control, for the time being, over her own property, whensoever and howsoever obtained, by gift, grant, purchase, devise, or inheritance, gives him outright her personal property in possession, and allows him to appropriate to himself those outstanding rights which are known as her *choses in action*, or all the rest of her personal property; parts with the usufruct of her real estate, creating likewise a possible encumbrance upon it in the shape of tenancy by the curtesy; and finally takes, if she survives him, only her real estate, such of her personal property as remains undisposed of and unappropriated, with a few articles of wearing apparel and trinkets called *paraphernalia*. She cannot restrain his rights by will. She is not allowed to administer on his personal estate in preference to his own kindred, though the whole of it were once hers; while he can administer on her estate for his own benefit, and exclude her kindred altogether, even from participation in the assets. The wife cannot sue or be sued in her own right, while the husband can. Thus unequal are the property rights of husband and wife by the strict rule of coverture.<sup>1</sup>

<sup>1</sup> We speak not here of recent statutory benefits conferred upon the wife; nor of that relief which equity affords in permitting property to be

58. Some recompense is afforded to the wife for the loss of her fortune in the rule that her husband shall pay her debts contracted while a *feme sole*; that is, unmarried. And while coverture lasts he is liable for all just debts incurred in her support. He has even been held guilty of murder in the second degree when he has suffered her to die for want of proper supplies.<sup>1</sup> The wife cannot make a contract so as to bind herself; but in this, and other cases of express or implied authority, she can bind her husband, and so secure a maintenance. That which cannot be enforced by the wife as a matter of obligation is often attained at the common law in some indirect way.<sup>2</sup> So, too, the husband is liable civilly for the frauds and injuries of the wife, committed during coverture; being suable either alone or jointly with her, in accordance with the legal presumption of coercion in such cases. And he must respond in damages, whether she brought him a fortune by marriage or not.<sup>3</sup> On the other hand, the husband takes the benefit of such injuries as she may suffer, by suing with her and appropriating the compensation by way of damages to himself.<sup>4</sup>

59. The wife is relieved of these disabilities of coverture, and placed upon the footing of a *feme sole*, with the privilege to contract, sue, and be sued, on her own behalf, in one instance, namely, where her husband has abjured the realm or is banished; for he is then said to be dead at the law.<sup>5</sup> And the necessity of the case furnishes the strongest argument for this exception. Another exception early prevailed in certain parts of England by local custom, — as that of London,

held to the wife's separate use, and giving her a provision from her *choses in action*, when the husband seeks its aid in appropriating them to his own use; but of what is to be properly termed the common law of husband and wife. § 54; 1 Bl. Com. 442-445, and notes, by Christian, Hargrave, and others; 2 Kent, Com. 130-143; and chapters *infra*.

<sup>1</sup> 1 Car. & K. 600.

<sup>2</sup> 1 Bl. Com. 442; 2 Kent, Com. 143-149.

<sup>3</sup> But as to the crimes of a spouse, see *ante*, 52.

<sup>4</sup> § 54; 1 Bl. Com. 443; 2 Kent, Com. 149, 150.

<sup>5</sup> 1 Bl. Com. 443; 2 Kent, Com. 154. See Separation, *post*, c. 17.

— where the wife might carry on a trade, and sue and be sued in reference thereto as though single.<sup>1</sup>

60. The figure of a coverture aids to illustrate the theory of our common law. In other words, a cover is placed over the woman when she marries, but removed whenever she survives the union. And furthermore, when married, she is married with her debts as well as her fortunes; for as Blackstone observes, her husband must be considered to have “adopted her and her circumstances together.”<sup>2</sup>

61. The rule of the wife's antenuptial debts and obligations well illustrates the rule of coverture we are considering. One of the immediate effects of marriage at the common law is that the husband at once becomes bound to pay all outstanding debts of his wife—her debts *dum sola*, as they are called—of whatever amount; and this, regardless of whether she brought him a fortune or not and whether he knew of them or not when he married her.<sup>3</sup> To charge the husband in general it is necessary that a judgment for such debts should be obtained against him during the coverture, and the suit should be brought against both husband and wife while the marriage lasts.<sup>4</sup> On the other hand, the husband remains liable for the antenuptial debts of his wife only so long as coverture lasts. As his liability originated in the marriage, so it ceases with it. Hence, if the obligation be not enforced in the lifetime of the wife, the surviving husband retains her fortune (if any) in his hands, and cannot be charged further

<sup>1</sup> § 55; 1 Selw. N. P. 298; Bing. Inf. 261, 262; Co. Litt. 351, b; 23 Q. B. D. 320. The modern practitioner is here cautioned that the statement of the common law in this chapter is a statement of doctrines which at the present day are found to be controlled and changed, to a great extent, by modern equity rules and legislation. See cs. 7-12, *post*.

<sup>2</sup> § 56; 1 Bl. Com. 443; 3 Mod. 186; 2 Kent, Com. 143-146.

<sup>3</sup> Her studious concealment of such debts matters not. § 56; Heard v. Stamford, 3 P. Wms. 409; Cas. temp. Talb. 173. An infant husband is equally bound with an adult husband; 9 Wend. (N. Y.) 238; 7 Met. (Mass.) 164. And as to an infant wife, see *Cole v. Seeley*, 25 Vt. 220; *Anderson v. Smith*, 33 Md. 465; 6 Bush (Ky.), 84. A second husband is liable for all outstanding debts of the widow he marries; 7 T. R. 348; 22 Ill. 390; 8 Johns. (N. Y.) 149.

<sup>4</sup> § 56; *Hawthorne v. Beckwith*, 89 Va. 786; 23 Q. B. D. 320.

with her debts either at law or in equity.<sup>1</sup> If the wife survives her husband, the cover is off and she becomes liable once more on her debts while sole; and this, too, though the means for extinguishing them may have already been squandered by her husband or placed beyond her reach.<sup>2</sup> Here is a great hardship, corresponding to that of the husband who married a wife without means and had to settle while coverture lasted.<sup>3</sup>

62. In respect to her disability to contract, the wife may be considered worse off at the common law than infants; for the contracts of an infant are for the most part voidable only, while those of married women are, with few exceptions, absolutely void. But the disabilities incident to these two conditions rest upon different grounds; for the disabilities attached to infancy are designed as a protection for the immature and inexperienced against the mature and fraudulent, while those incident to coverture are the simple consequence of that sole or paramount authority which the law vests in the husband, and of that tegument or cover by marriage

<sup>1</sup> 2 Kent, Com. 144. But see *Heard v. Stamford*, 3 P. Wms. 409, as to administration of wife's estate; 10 B. Monr. (Ky.) 411; *Day v. Messick*, 1 Houst. (Del.) 328. And as to husband's estate, see 2 Jones, Eq. (N. C.) 204. See *Cole v. Shurtleff*, 41 Vt. 311 (parol promise). The husband's promise as a widower is without consideration; nor will equity intervene for the creditor because he has gained a fortune by her. 23 Q. B. D. 320.

<sup>2</sup> 1 Camp. N. P. 189, per Lord Ellenborough.

<sup>3</sup> Since this liability for a wife's antenuptial is now very generally abolished by modern legislation, we need hardly pursue the subject in further detail. But it may be briefly added that the liability of the husband for his wife's debts while sole was limited strictly to legal demands; or to such as she was bound to pay at the time of her marriage. All such actions were to be brought against husband and wife jointly, and not against either separately; the object being to retain the remedy in hand so that execution might be taken out against the proper party according to circumstances; for, if the husband died pending the suit, the wife, on her survivorship, became liable. § 57 and cases cited.

So far as rights of third parties are concerned, the liability of the husband for his wife's debts *dum sola* cannot be affected by any antenuptial contract between the two; nor of course by their agreement during coverture. 27 Ark. 288. The special contract of a husband with the

which put the wife for the time being out of legal reach.<sup>1</sup> Common sense teaches that married women have sufficient discretion to act for themselves, and stand on a different footing from young children; and this our law fully recognized, irrespective of equity rules or legislation, by empowering adult women to contract up to the very moment of their marriage, and from the time when coverture ceases. At most it could only be said that a woman, while living in the married state, was peculiarly subject to influence from the other sex, which might be exerted to her disadvantage. The husband may make in his own right such contracts as he pleases, as well during coverture as before; he is never presumed to act under the wife's influence.<sup>2</sup> But the wife by coverture becomes totally disqualified and legally irresponsible at the common law, except in the single instance where her husband is *civiliter mortuus*, as already stated; and in certain localities where the separate trade custom applied.<sup>3</sup>

creditor, relating to his wife's debt *dum sola*, furnishes a different cause of action to the creditor from that which arises out of the debt *dum sola* taken by itself. 30 Ohio St. 365; § 57. See *post*, ca. 11, 12; *Williams v. Mercier*, 9 Q. B. D. 337; 23 Q. B. D. 316. A debt due from a woman to a man is extinguished by their marriage. *Gosnell v. Jones*, 152 Ind. 638. See c. 14; 56 A. 661 (Vt.).

<sup>1</sup> See § 58; *Bing. Inf. & Cov.* 181, 182, Am. ed.; 2 Kent, Com. 150; *post*, Infancy.

<sup>2</sup> *City Council v. Van Roven*, 2 McCord, 465.

<sup>3</sup> See 59.

To illustrate the wife's disability. She cannot earn money for herself. 2 Man. & Gr. 172; c. 5, *post*. She cannot, whether as surety or principal, or to accommodate, jointly with her husband or alone, sign or indorse a promissory note, so as to bind herself. 2 Ad. & El. 30; *Snider v. Ridgeway*, 49 Ill. 522; *O'Daily v. Morris*, 31 Ind. 111; *Dollner v. Snow*, 16 Fla. 86; 1 Lea (Tenn.), 633; *Brown v. Orr*, 29 Cal. 120; *Tracy v. Keith*, 11 Allen (Mass.), 214; 58 Vt. 172; 60 N. H. 189; 53 Wis. 101; 173 Mass. 517 (note to husband's order). Nor execute a bond or other instrument under seal. 43 Miss. 61; *Huntley v. Whitner*, 77 N. C. 392; 84 Ind. 154 (replevin bond). Nor purchase on her own credit; nor agree to keep a money deposit payable on demand; nor be surety for her husband or another. § 58; *Swing v. Woodruff*, 41 N. J. L. 469; *Gosman v. Cruger*, 69 N. Y. 87; *Luther v. Cote*, 61 N. H. 129; 60 N. H. 189. Nor bind herself by a recognizance. See 79 Ind. 286; 17 Vroom (N. J. L.) 94. Nor execute a letter of attorney. 100 Mo. 571. Nor other-

63. So far is this doctrine of the wife's contract disability carried, that the agreement of a widow, after her husband's death, to pay a debt which she had contracted during coverture, and which consequently was not binding upon herself, but, if at all, upon her husband, has been treated as void, on the ground that the promise was without consideration and only morally binding.<sup>1</sup> And so is it with the wife's promissory note for her husband's debt, and her renewal note, which, when a widow, she promises to pay or acknowledges.<sup>2</sup> As a

wise make a valid contract. *Avery v. Griffin*, L. R. 6 Eq. 606; *Tobey v. Smith*, 15 Gray (Mass.), 535; 28 Barb. 438; *Lee v. Lanahan*, 58 Me. 478. Her judgment bond is void. *Schlosser's Appeal*, 58 Penn. St. 493. Likewise her warrant of attorney to confess judgment. *Swing v. Woodruff*, 41 N. J. L. 469; *Shallcross v. Smith*, 81 Penn. St. 32.

She is permitted, as we shall hereafter see, to pass her real estate by joining in a deed with her husband; but when she does so she is not bound by her covenants, nor was her separate conveyance (except by some matter of record) of any effect whatsoever at common law. § 58; 2 Bl. Com. 293, 351, 364; *Robinson v. Robinson*, 11 Bush (Ky.), 174; *Ferguson v. Reed*, 45 Tex. 574; 49 Cal. 93 (land patent); *Botsford v. Wilson*, 75 Ill. 133; 2 Kent, Com. 150-154, 167, 168. See *post*, c. 6. Her covenant in a mortgage of her husband's property, or title bond, or executory contract to convey land, is equally ineffectual. *Kitchell v. Mudgett*, 37 Mich. 81. 29 Ark. 650; 79 Ill. 164; *Harris v. Dodge*, 72 Md. 186. A sheriff's sale of her land upon her judgment note, given as security for her husband, may be set aside as void. *Doyle v. Kelly*, 75 Ill. 574. A married woman cannot bind herself by her contract to convey estate which is devised to her in trust for sale. *Avery v. Griffin*, L. R. 6 Eq. 606. The executory and unacknowledged contract of a married woman, being void as a contract, cannot be supported as against her on the ground of estoppel. *Wood v. Terry*, 80 Ark. 385; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164. But cf. *Norton v. Nichols*, 35 Mich. 148. Cf. La. Ann. 324; 25 Fla. 927.

Otherwise as to modern legislation, which, however, inclines to protect the wife in some respects. See cs. 10, 11, *post*. See 116 N. Y. 606; 88 Wis. 188; § 58.

Where a wife performs on her own part—as in becoming lessor or lessee—the other contracting party cannot avail himself of coverture in defence of her suit. *Ray v. Natural Gas Co.*, 138 Penn. St. 576.

<sup>1</sup> § 59; 8 Ad. & El. 467; *Waul v. Kirkman*, 25 Miss. 609; 1 Thomp. & C. 140; *Kent v. Rand*, 64 N. H. 45. But cf. 1 Cr. & J. 231.

<sup>2</sup> *Hubard v. Bugbee*, 58 Vt. 172; *Candy v. Coppock*, 85 Ind. 594; *Long v. Rankin*, 108 N. C. 333; *Nesbitt v. Turner*, 155 Penn. St. 429. Cf. 140 Penn. St. 63; 141 Penn. St. 176.



rule, at common law, the widow cannot be compelled to make good an engagement or fulfil a contract which she entered into while under the disability of coverture, without, at all events, some new and distinct consideration.<sup>1</sup> Nor is the contract of a married woman enforceable against her after divorce, notwithstanding her subsequent promise when once more *sui juris*; for such promise is without consideration.<sup>2</sup>

64. But the wife may bind her husband as agent, at the common law, although having no power to make a contract in her own right. Her authority in this respect may be general or special, express or implied. Blackstone says that the power of the wife to act as attorney (or agent) for her husband implies no separation from, but is rather a representation of, her lord.<sup>3</sup> Whenever, therefore, the husband expressly empowers his wife to make a contract for him, he will be bound as in the case of any other principal who employs a representative. And he may bind himself in like manner for any unauthorized contract proceeding from his wife as agent, by subsequent conduct on his part such as amounts to ratification. But greater difficulty arises in determining his liability upon contracts where the authority is not express but only implied. How far does the law go in presuming against the husband, and what are the proper limits of an implied authority in the wife to bind him by her contracts? Let us premise, as a suitable conclusion from the preceding sections, that the husband may be bound in one of two ways: either upon his own contract or upon that made by the wife as his agent; and hence he may be held liable either because the debt or obligation was his own, or else because his wife represented him.<sup>4</sup>

<sup>1</sup> *Ross v. Singleton*, 1 Del. Ch. 149; 71 Md. 368. Cf. cs. 10, 11, *post*. As to a surviving husband, see § 59; *Cha. Cas.* 80, 295.

<sup>2</sup> *Putnam v. Tennyson*, 50 Ind. 456.

The wife's contract if unenforceable against her while living is of course unenforceable against her estate at her death. *Davis v. Carroll*, 71 Md. 468.

<sup>3</sup> 1 Bl. Com. 442; 2 Man. & Gr. 172; *Mizen v. Pick*, 3 M. & W. 481.

<sup>4</sup> § 60. The natural effect of his joining with her in executing a contract or instrument would be to render it his individual obligation, since

65. The liability of the husband in contracts made by the wife for necessaries rests, at the common law, on this important principle of the wife's agency. It is a clear obligation which rests upon every husband to support his wife; that is, to supply her with necessaries suitable to her situation and his own circumstances and condition in life. Notwithstanding a man married unwillingly,—as, for instance, to avoid a prosecution for seduction or bastardy,—he is bound to support the woman, so long as he is a husband *de facto* at all.<sup>1</sup> And this obligation extends to the whole young family, with such modifications as will more properly be noticed in treating of parent and child.<sup>2</sup> To enforce such marital obligations the law takes a circuitous course; and the wife may secure herself from want against a cruel and miserly husband, of ample means to support her, by pledging his credit and making such purchases as are needful, on the strength of an implied authority for that purpose.<sup>3</sup> Here, all other things being he is *sui juris*; while if she executed alone, and without a suitable agency on his behalf, the obligation would be altogether void. *Dressel v. Jordan*, 104 Mass. 497.

<sup>1</sup> *State v. Ransell*, 41 Conn. 433. But though this obligation appears to rest on the foundation of natural justice, the common law assigns, as the true legal reason, that she may not become a burden to the community. So long as that calamity is averted, the wife has no direct claim upon her husband under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief; in which case the parish authorities will insist that the husband shall provide for her to the extent of sustaining life. *Rex v. Flintam*, 1 B. & Ad. 227; 7 Ad. & El. 819; § 61.

<sup>2</sup> See Part III., c. 2. This applies on principle to one's family *de facto*, so far, at least, as the children are of tender years and dependent. If a man marry a widow he is not bound to maintain her children; unless he holds them out to the world as part of his own family. *Attridge v. Billings*, 57 Ill. 489. But cf. 4 T. R. 118; 4 East, 76; § 61.

<sup>3</sup> As an agent duly authorized, the wife may doubtless pledge her husband's credit for the necessaries of the young children with her, as well as her own. But upon the doctrine of presumptions and an implied authority from him to do so, the common law is more reserved. "Family necessaries" is an expression of our later statutes which indicates a growing favor in that direction, and modern custom may, of course, extend the implied scope of an agency beyond earlier usage. § 71. And see 54 Miss. 368; 26 Mich. 179.

equal, it is presumed that she was her husband's agent; and no direct permission need be shown. Indeed, wherever the facts are clear that those articles were actually needed, and that the husband failed to supply them, this presumption is carried so far as to control even the express orders of the husband himself. The articles for which a wife is thus allowed to pledge her husband's credit as his presumed agent are designated at common law as necessaries.<sup>1</sup>

66. The wife's necessaries are such articles as the law deems essential to her health and comfort; chiefly food, drink, lodging, fuel, washing, clothing, and medical attendance. They are to be determined, both in kind and amount, by the means and social position of the married pair, and must therefore vary greatly among different grades in different localities, and at different stages of society.<sup>2</sup> Thus a large milliner's bill might not be deemed necessaries for the wife of a laborer, while a wealthy merchant would be bound to pay it. So, too, necessaries to-day are not what they were fifty or a hundred years ago. Nor is the ordinary test to be found in the real situation and means of the married parties (for this a tradesman cannot be expected to investigate), but in their apparent situation, the style they assume, and the establishment they maintain before the world; which every husband is supposed to regulate with sufficient prudence.<sup>3</sup> Articles, too, may be of a kind which the law pronounces necessaries, and yet a wife may be so well supplied as not to need the particular articles in question, — a distinction of some consequence. The decisions in the books, relating to necessaries, are therefore somewhat confusing, as might be expected; the more so since the dividing line between law and fact in such cases is not marked with distinctness. Sometimes the court decides whether articles are necessary, sometimes a jury. The ordinary rule is that the court shall decide whether certain articles are to be classed as necessaries; while the jury may determine the question of amount, and apply this classi-

<sup>1</sup> § 61.

<sup>2</sup> § 61; 1 Bl. Com. 442.

<sup>3</sup> 1 Camp. 120.

fication to the facts;<sup>1</sup> but this rule, though seemingly precise, is found difficult in its practical application.<sup>2</sup>

<sup>1</sup> § 61; 1 Allen (Mass.), 261; Parke v. Kleeber, 37 Penn. St. 251; Raynes v. Bennett, 114 Mass. 424; Phillipson v. Hayter, L. R. 6 C. P. 38; 41 A. 792.

<sup>2</sup> Among the cases we find the following articles classed as necessities for the wife: Board and lodging. Medicines, medical attendance, and reasonable expenses during illness. 1 P. Wms. 438; Mayhew v. Thayer, 8 Gray (Mass.), 172; Cothran v. Lee, 24 Ala. 380; 2 Redf. (N. Y.) 258. Furniture of a house. 5 Bing. 550. Apparel according to station in life. Skin. 349. Watches and jewelry such as befit the style of dress which the husband sanctions, especially if not wholly ornamental. Raynes v. Bennett, 114 Mass. 424. Reasonable legal expenses incurred by a wife who had been deserted. Wilson v. Ford, L. R. 3 Ex. 63. Reasonable legal expenses in defence of a prosecution instituted against a wife by her husband (Warner v. Heiden, 28 Wis. 517), and even, in a just cause, for her prosecuting him. 3 Camp. 326; Morris v. Palmer, 39 N. H. 123. As to the defence of the wife upon a prosecution from without, see 38 Ill. App. 593. A horse worth \$45 for the invalid wife of a miller earning \$30 per month, in order that she might take exercise as advised by a physician; the question of suitableness, however, being left to the jury. Cornelia v. Ellis, 11 Ill. 584. A set of false teeth, and reasonable dentistry. Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrus, 28 Vt. 241. Household supplies reasonable and proper for the ordinary use of a family, although the wife receives the earnings of two daughters living with her. Hall v. Weir, 1 Allen, 261. Perhaps a piano. Parke v. Kleeber, 37 Penn. St. 251. Cf. Chappell v. Nunn, 41 L. T. 287; 138 Mass. 358. Expense of a proper surgical operation. 70 Md. 162.

But, on the other hand, the following articles have been held not to be necessities: Articles of costly jewelry, in a doubtful case. 47 Minn. 250; 3 B. & C. 631. *Semle*, a sewing-machine. 99 Penn. St. 586. A deed of separation. Ladd v. Lynn, 2 M. & W. 265. The expense of an indictment by the wife, if the grounds for instituting criminal proceedings did not appear reasonable. 5 Ad. & El. 755; Smith v. Davis, 45 N. H. 566. Counsel fees in a suit for divorce or to enforce a marriage settlement, whether the wife be plaintiff or defendant. Pearson v. Darrington, 32 Ala. 227; Thompson v. Thompson, 3 Head (Tenn.), 527; Dow v. Eyster, 79 Ill. 254; Whipple v. Giles, 55 N. H. 139; Clarke v. Burke, 65 Wis. 359. In a divorce suit the tribunal for equity or divorce regulates allowances of the kind; there is no action at law. Wolcott v. Patterson, 100 Mich. 227; Westcott v. Hinckley, 56 N. J. L. 343. Cf. 34 E. L. & Eq. 214; 38 Iowa, 166. Legal expenses and fees are sometimes chargeable against a husband, in cases of this sort, because the statute says so. Thomas v. Thomas, 7 Bush (Ky.), 665; Warner v. Heiden, 28 Wis. 517; 50 Ga. 94. Distinctions are taken; as *e. g.* in favor of a wife who defends against her husband's complaint. 133 Mass. 503. The wife's position

67. Whether husband and wife live together or apart is an important distinction to be observed in this matter of an agency for necessities for the wife and young children. Where the wife lives with him, the husband's assent to her contract for necessities is inferred from circumstances which show authority actually conferred, or else the law supplies an assent for her benefit where he has improperly refused or neglected to provide for her wants. Where they live apart, separation is either voluntary or involuntary and the circumstances become material. Let us consider these two classes of cases separately.

68. (1) *As to a husband's liability where his wife lives with him.* Here we are met at the outset by the broad presumption is a hard one if she can neither employ counsel on her own account or her husband's. See 103 Penn. St. 473. Decisions differ; but the weight of authority is that an action at law for his fees cannot be maintained by a solicitor who prosecutes or defends on the wife's behalf against her husband. Fees and retainers for more solicitors than were needful cannot be allowed. Nor attorney's fees in a groundless suit brought by the wife against a third party without the husband's consent. 46 Minn. 23. Passage tickets in general to enable the wife to travel, except perhaps for a clearly needful purpose. *Knox v. Bushell*, 3 C. B. N. S. 334. Medical attendance rendered, without the husband's assent, by a quack doctor. *Wood v. O'Kelly*, 8 Cush. (Mass.) 406. Though when a husband disputes a bill for medical attendance on the ground of malpractice, or an unnecessary surgical operation, the burden is on him to show it. 19 Pick. (Mass.) 333. "Religious instruction," or the rent of a church pew. *St. John's Parish v. Bronson*, 40 Conn. 75. Articles, in general, which are extravagant and altogether beyond the husband's circumstances and degree in life. 2 Ashm. (Penn.) 140. See *Phillipson v. Hayter*, L. R. 6 C. P. 38.

Money lent the wife for the purchase of necessities, or for other purposes however suitable, is not classed with necessities at the common law; probably because husbands do not often confer an authority liable so easily to abuse. 7 W. & S. (Penn.) 83; 7 Taunt. 432; *Knox v. Bushell*, 3 C. B. N. S. 334; *Skinner v. Tirrell*, 150 Mass. 474. Especially where the spouses live apart. But equity takes a view more consonant to the wants of a distressed wife, and allows the person lending the money to stand in the stead of the tradesman, and to recover if the money was actually used for necessities; thus leaving him bound, in other words, only to see that his loan is properly applied. 1 P. Wms. 482; 7 W. & S. (Penn.) 83; *Kenyon v. Farris*, 47 Conn. 510; *Deare v. Soutten*, L. R. 9 Eq. 151; *Leuppie v. Osborn*, 52 N. J. Eq. 637.

of assent which cohabitation of itself furnishes. The simple circumstance that husband and wife are living together has been generally held sufficient, when nothing to the contrary intervenes, to raise a presumption that the wife rightfully makes such purchases of necessities as she may deem proper.<sup>1</sup> Whoever then supplies her in good faith, as the law has usually been understood, need inquire no further, but may send his bill to her husband.<sup>2</sup> The wife's contract for necessities will bind the husband to a still greater extent if the evidence warrant the inference that a more extensive authority has in fact been given.<sup>3</sup> Yet we must observe that the question is, after all, one of evidence; it turns upon the question of authority from the husband; and this presumption in the wife's favor may be rebutted by contrary testimony on the husband's behalf.<sup>4</sup> Lord Holt says: "His assent shall be presumed to all necessary contracts, upon the account of cohabiting, *unless the contrary appear*."<sup>5</sup> Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself or by other agents, or that he gave her ready money to make the purchase.<sup>6</sup> This is on

<sup>1</sup> § 63; *Montague v. Benedict*, 3 B. & C. 631; *Manby v. Scott*, 1 Mod. 124; 9 Car. & P. 643.

<sup>2</sup> § 63.

<sup>3</sup> § 63; 4 Nev. & Man. 559; 40 E. L. & Eq. 518. Thus the presumption which cohabitation furnishes is strengthened by proof that the wife has been permitted by the husband to purchase other articles of the same sort for the use of the household; that is, things for what may be termed the domestic department, to which the wife's authority to bind her husband is usually restricted. *Phillipson v. Hayter*, L. R. 6 C. P. 38.

<sup>4</sup> *Lane v. Ironmonger*, 13 M. & W. 368.

<sup>5</sup> 1 Salk. 118. See also 11 Johns. (N. Y.) 281; 3 B. & C. 631. "What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife." *Willes, J.*, in *Phillipson v. Hayter*, L. R. 6 C. P. 38. And see *Bovill, C. J.*, *ib.*, to the same effect.

<sup>6</sup> 1 Sid. 109; 5 Bing. 28; 2 Ld. Raym. 1006; *Morgan v. Hughes*, 20 Tex. 141; *Jolly v. Rees*, 15 C. B. N. s. 628; 11 Johns. (N. Y.) 281;

the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that, so long as he has provided necessities in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt.<sup>1</sup> In general, while the spouses live together, a husband who supplies his wife with necessities suitable to her position and his own is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction.<sup>2</sup>

69. But a husband's ratification, in this connection, is as available to the person who has furnished necessities as a previous authority. So, then, if it can be shown that the husband knew his wife had ordered certain necessities, and yet failed to rescind the purchase; or if there be proof that he knew she wore the articles and yet expressed no disapprobation; and especially where the husband and his household knowingly take the benefit of the necessities — the law presumes approval of her contract and binds him.<sup>3</sup> The hus-

*Keller v. Phillips*, 39 N. Y. 351. As to the method and effect of notice, see 11 Fost. (N. H.) 111; 66 Iowa, 698; 33 Barb. (N. Y.) 160; *Barr v. Armstrong*, 56 Mo. 577.

<sup>1</sup> Accordingly in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessities at his own home, he is not liable to provide them elsewhere.

<sup>2</sup> § 63. As a rule a husband who furnishes his wife and family with necessities, in any reasonable manner, has the right to prohibit particular persons from trusting or dealing with her on his account. Notice to this effect, properly given, will be effectual as against any presumption which cohabitation raises. Cohabitation furnishes, as we have seen, a presumption of authority; but the latest English decisions go very far toward annihilating that presumption by insisting that the question of the wife's express or implied authority is purely one of fact according to the circumstances of each case, where the spouses live together. The point decided, however, in dispensing with notice affects only tradesmen and others who have had no previous dealings with the wife, to which the husband's assent was given. *Debenham v. Mellon*, L. R. 5 Q. B. D. 894; 15 C. B. N. s. 628. The same principle is confirmed in this country by *Woodward v. Barnes*, 43 Vt. 330; 85 N. Y. S. 387. But cf. 24 Ala. 380; 84 N. H. 420.

<sup>3</sup> 5 Bing. 28; 2 Moo. & P. 74; *Parke, B.*, in *Lane v. Ironmonger*, 13

band's dissent to his wife's purchase of necessities should be expressed in an effectual and suitable manner; mere objection on his part is insufficient.<sup>1</sup> Nor can private arrangements between husband and wife as to the method of payment affect the rights of third parties who were entitled to notice thereof and failed to receive it.<sup>2</sup>

70. The presumption is overcome of an agency on her husband's behalf (which is strong because it is the husband's duty to furnish all necessities) by the fact of a purchase or order by the wife upon her own or some third person's credit, wherever she is really trusted as principal herself, or as the agent of some one else than her spouse; or where the third party ordered them in person.<sup>3</sup>

M. & W. 368; *Day v. Burnham*, 36 Vt. 37; 43 Vt. 330; 33 Barb. (N. Y.) 160. And see 2 Roper, Hus. & Wife, 112; § 64.

But the question is one of approval or disapproval, assent or dissent, and a presumption against the husband may be rebutted. 7 Car. & P. 756. If he promises to pay for necessities already bought, and such as he ought to supply, it is a ratification, even though he further directs the tradesman to supply no more. *Conrad v. Abbott*, 132 Mass. 330.

<sup>1</sup> *Cothran v. Lee*, 24 Ala. 380 (medical attendance).

<sup>2</sup> *Ib.*; *Johnston v. Sumner*, 3 Hurl. & Nor. 261. Cf. 68.

If one means, when sued in assumpsit for necessities, to defend the action as to part only, it would appear that his proper plea will be that he is not liable beyond a certain amount, and he should pay that amount into court. *Emmet v. Norton*, 8 Car. & P. 506. But if he means to dispute the charge altogether, common honesty dictates that the articles unwarrantably purchased should if possible be restored without delay. § 64; *Gilman v. Andrus*, 28 Vt. 241. See 43 Vt. 542; *Baker v. Carter*, 83 Me. 132. He may introduce evidence at the trial to show that the commodities in question were not necessities, inasmuch as the wife had incurred other similar debts with other parties. *Renaux v. Teakle*, 20 E. L. & Eq. 345.

<sup>3</sup> § 64. In all cases the husband will be discharged from liability where it appears that the goods were not supplied on his credit, but that the party furnishing them trusted the wife individually. 3 Camp. 22; 5 Taunt. 356; 32 Ala. 227; 2 Wend. (N. Y.) 454; 2 Hill (S. C.), 335; 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497. See 33 Minn. 370. She might have separate property, independently of her husband, to which the tradesman or other creditor looked for payment, or a special allowance of sufficient amount might have been made her by her husband, and such separate property must respond. *Levett v. Penrice*, 24 Miss. 416; *Simmons v.*



71. The usual analogies of agency may be transcended, notwithstanding the spouses live together, when the one is truly delinquent, and the other deprived of the support owing her. Wherever the husband neglects to supply his wife with necessities, or the means of procuring them, she may obtain what is strictly needful for her support, on the pledge of his credit, although it be against his wishes. And the person furnishing the articles may sue the husband notwithstanding he has been expressly forbidden to trust her.<sup>1</sup>

72. (2) Where spouses live apart, the special circumstances must be considered. The rule is, that if the husband unlawfully abandons his wife, turns her away without reasonable cause, or compels her by ill usage to leave him, without adequate provision, he is liable for her necessities, and sends

McElwain, 26 Barb. 420; McMahon v. Lewis, 4 Bush (Ky.), 138; Weisker v. Lowenthal, 31 Md. 413; 86 Va. 328; Wolcott v. Patterson, 100 Mich. 227 (cost of divorce litigation); 4 B. & Ald. 252; Montague v. Benedict, 8 B. & C. 631; 18 Miss. 106; 20 E. L. & Eq. 345. So if credit be given to any third party, the husband is not liable. Harvey v. Norton, 4 Jur. 42. And of course if the tradesman has agreed not to charge him, there is no liability incurred by the husband. 8 Car. & P. 717. Though the wife be without property, the rule is the same; except that no wife can be personally bound; and it would appear that the husband may give permission to trust his wife on her separate credit without incurring a personal liability. Taylor v. Shelton, 30 Conn. 122; 11 Ga. 324; Valentine v. Bell, 66 Vt. 280. The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife. 40 E. L. & Eq. 518; 5 Harring. (Del.) 396; 35 Me. 332; 83 Me. 132. Where the wife actually pays out of her own separate means for necessities, this does not create a liability against her husband for repayment, aside from circumstances importing a promise on his part to make it. Nostrand v. Ditmis, 127 N. Y. 355; c. 14, *post*.

<sup>1</sup> § 65; 39 N. Y. 351; Woodward v. Barnes, 43 Vt. 330; McGrath v. Donnelly, 131 Penn. St. 549. But here the law raises a presumption of agency only for the purpose of enforcing a marital obligation. Such an agency is perhaps an agency of necessity. Pollock, C. B., in Johnston v. Sumner, 3 H. & N. 261. And the tradesman or other party furnishing supplies when forbidden is bound to show affirmatively and clearly that the husband did not provide necessities for his wife, suitable to her condition in life. Keller v. Phillips, 39 N. Y. 351; 43 Vt. 330. As to suing for support of the wife as a pauper, see 6 Gray (Mass.), 416; 7 N. H. 571; 18 Barb. 100. See 52 N. J. L. 277.

credit with her to that extent.<sup>1</sup> The wife's faithfulness, on the one hand, to her marriage obligations; on the other, the husband's disregard of his own, — these afford the reason of the above rule and suggest its proper limitation; and yet the rule appears in the latest cases to assume the husband's continuing liability unless he has good ground for divorce. The wife in such cases has an authority; but here what some have certainly called an authority of necessity.<sup>2</sup> Or we may say, rather, that the law, by a fiction, infers an agency without asking evidence which should show authority in fact, and requires the husband, under these circumstances, to maintain his wife elsewhere.<sup>3</sup> Where the wife is justified on any of the true grounds in living apart from her husband, he is not discharged from liability by showing that her contract was in fact made without his authority and contrary to his wishes. Nor will his general advertisement or particular notice to individuals not to give credit to his wife affect the case.<sup>4</sup> The legal presumption must prevail for the wife's protection. And in all such cases, if the husband seeks to escape her pledge of his credit, he should not only provide suitable necessities through persons of his own choice, but make that provision known to the wife.<sup>5</sup>

<sup>1</sup> § 66; 1 Dutch. (N. J.) 94; *Mayhew v. Thayer*, 8 Gray (Mass.), 172; *Eiler v. Crull*, 99 Ind. 375.

<sup>2</sup> See *Pollock, C. B.*, in 3 H. & N. 261; 3 Taunt. 421, an old case.

<sup>3</sup> This rule suggests, then, three cases where the wife may pledge her husband's credit when they are living apart: the first, where he abandons her; the second, where he turns her out of doors without reasonable cause; the third, where his misconduct compels her to leave him. In the first two cases his own acts impose the necessity, and her conduct is involuntary. But in the third her conduct might be considered voluntary, though induced by his misconduct; and the rule here becomes perplexing. If the husband, by his indecent conduct, renders his house unfit for a modest woman to share it, the rule now is that she may leave him, and pledge his credit elsewhere for her necessities. 2 Stark. 77; 3 Bing. 127; *Hultz v. Gibbs*, 66 Penn. St. 360; *Reynolds v. Sweetser*, 15 Gray (Mass.), 78; *Bazeley v. Forder*, L. R. 3 Q. B. 559. An old case, *contra* (3 Taunt. 421), is overruled.

<sup>4</sup> § 66; 4 Esp. 41; *Watkins v. De Armond*, 89 Ind. 553; *Pierpont v. Wilson*, 49 Conn. 450; 18 Tex. 453; 175 Mass. 316 (desertion by husband).

<sup>5</sup> *Preston v. Bancroft*, 62 Vt. 86.

Nor, in such cases, can the husband terminate his liability for neces-

73. But the wife should have weighty and sufficient cause for leaving her husband in order to be permitted, on her part, to pledge his credit abroad. In general, the same facts suffice as justify her divorce from bed and board.<sup>1</sup> But where she leaves her husband without sufficient cause and against his will, he is not liable for her maintenance elsewhere, and she cannot bind him; especially if the person furnishing goods knows that cohabitation has ceased, and makes no further inquiries. And if the wife elopes and then commits adultery, or if her adultery causes separation, the husband becomes relieved from her support.<sup>2</sup> The true

saries supplied his wife during the separation by a simple request on his part that she shall return. 1 You. & Jer. 501. And it is clear that if he only offers to take her back upon conditions which are unreasonable and improper, his liability continues. 5 Car. & P. 200. It is the husband's duty, by some positive act, to determine his liability; though if the wife voluntarily returns, his liability for necessaries furnished abroad is discontinued. But in default of any amicable arrangement, he must institute divorce or statutory proceedings, and until some such unequivocal act is done, a person making a proper claim in a court of law for necessaries supplied to the wife may be entitled to recover against him. § 66; 2 C. B. n. s. 763. Where the wife had good reasons for leaving, the husband is not discharged, by the fact of her subsequent return, from liability for necessaries furnished during her justifiable absence. Reynolds v. Sweetser, 15 Gray (Mass.), 78.

<sup>1</sup> § 66; 3 Humph. (Tenn.) 135; 10 Cush. (Mass.) 41; 25 Ill. 503; 12 Md. 294; Stevens v. Story, 43 Vt. 327; Barker v. Dayton, 28 Wis. 367; Thorpe v. Shapleigh, 67 Me. 235. But as to the commencement of divorce proceedings, cf. Sturbridge v. Franklin, 160 Mass. 149.

There is some dispute on the point of liability where the wife leaves without good reason, and upon offering to return the husband refuses to receive her. See § 66 and cases cited.

<sup>2</sup> § 66; 1 Stra. 617; 8 Car. & P. 512; Schouler, Hus. & Wife, § 113. In such case his refusal to take her back again will not revive his obligation to maintain her. But as forgiveness always interposes a bar to legal remedies on behalf of the injured one, he becomes once more liable for her necessaries, where he voluntarily receives her again and forgives her. 4 Esp. 41; 6 Mod. 171; 4 B. & Ald. 252; Quincy v. Quincy, 10 N. H. 272. Supposing the wife be turned out of doors, or, what amounts to the same thing, be forced by her husband's misconduct to leave; and she afterwards, being beyond that shelter which every wife needs, commit adultery; is he then relieved from supporting her? See Govier v. Hancock, 6 T. R. 603 (a harsh case). Connivance of a hus-

doctrine is that after a reconciliation the husband is liable upon his wife's subsequent contracts only.<sup>1</sup>

**74. But besides involuntary separation, the case of voluntary separation is to be considered; and this, now so frequent, the law tolerates, but does not favor. The rule is, that where a husband and wife parted by mutual consent, and a suitable allowance is furnished the wife, the husband is not bound to pay any bills which she may have contracted as his agent.<sup>2</sup> It is enough that the separation be a matter of common reputation where he resides. But to this allowance two things are requisite: first, that it shall be really sufficient for the wife; next, that it shall be regularly paid. If either require-**

band or corresponding guilt should be taken against him. See *Needham v. Bremner*, L. R. 1 C. P. 583; *Wilson v. Glossop*, 19 Q. B. D. 379; *Ferren v. Moore*, 59 N. H. 106. But one who harbors another man's wife for illicit purposes is a wrong-doer, and cannot recover for her maintenance, even though she had fled from her own husband's cruelty. *Almy v. Wilcox*, 110 Mass. 443.

<sup>1</sup> § 67; *Williams v. Prince*, 3 Strobb. (S. C.) 490; 26 Mo. 508; *Oinson v. Heritage*, 45 Ind. 73. See also 12 Johns. (N. Y.) 293. Cf. 6 Mod. 171.

How far the wife can contract liability for necessities in her own person, when the husband is discharged by her delinquency, was considered in *Marshall v. Rutton*, 8 T. R. 547. Cf. 1 B. & P. 339; *Childress v. Mann*, 33 Ala. 206; *McHenry v. Davies*, L. R. 10 Eq. 88. See *post*, as to wife's necessities under modern legislation.

Concerning the destitute wife of a husband confined in prison or as an insane person, see 4 E. L. & Eq. 523; 16 Pick. (Mass.) 198; *Richardson v. Du Bois*, L. R. 5 Q. B. 51; *Ahern v. Easterby*, 42 Conn. 546. If the wife be in an insane asylum, or a poor-house, the husband is not the less liable for her support. *Wray v. Wray*, 33 Ala. 187; 61 Fed. (U. S.) 277. Such necessities may be furnished by an individual or by public authorities under the poor laws. 160 Mass. 149. But not where she is in prison. 2 Stra. 1122; *Bates v. Enright*, 42 Me. 105. And it seems that under circumstances of misconduct on the wife's part, the husband may compel her to assent, after her release from confinement, to live separate on an allowance, without being chargeable for her support as one who has turned his wife out of doors. 33 Ala. 187; *Brookfield v. Allen*, 6 Allen (Mass.), 585.

<sup>2</sup> 8 Car. & P. 717; 1 Ld. Raym. 444; 6 B. & C. 200; *Mizen v. Pick*, 3 M. & W. 481; *Schouler, Hus. & Wife*, § 117; *Kemp v. Downham*, 5 Harring. (Del.) 417; *Caney v. Patton*, 2 Ashm. (Penn.) 140; 8 Johns. (N. Y.) 72; *Alley v. Winn*, 134 Mass. 77. But cf. *Lawrence v. Brown*, 91 Iowa, 342.

ment be wanting, — a fact which the seller must ascertain at his peril, — the wife is not confined to her remedy on the deed of separation, if any, but may pledge her husband's credit.<sup>1</sup> If wife and husband part by mutual consent, and there is no allowance to the wife, it may be presumed that the wife has the right to pledge her husband's credit, for he has not relieved himself of his marital obligation.<sup>2</sup>

**75. The presumption of an agency changes sides** whenever husband and wife separate under circumstances showing misconduct on the part of either. The very fact of their living apart is of itself a caution to all who hold dealings with a married pair. While they cohabit it is usually for the husband to show a want of authority; when they cease to cohabit the seller must prove authority; that is to say, he must prove that the wife was in need of the goods, that the husband failed to supply her, and that the wife was not at fault. The burden is here upon the dealer, in short, to make out a justifiable cause for supplying without actual authority from the husband. *Prima facie*, therefore, a woman living apart from her husband, upon either voluntary or involuntary separation, has no authority to bind him.<sup>3</sup> Courts will always

<sup>1</sup> § 74. As to the former requirement, see 4 Burr. 2177; *Pearson v. Dartington*, 32 Ala. 227; 2 Starkie, 77; 8 Car. & P. 506. As to the latter, see 5 B. & P. 148, per Heath, J.; 6 B. & C. 200; 12 Johns. (N. Y.) 248; 11 Wend. (N. Y.) 33.

<sup>2</sup> *Ross v. Ross*, 69 Ill. 569; 91 Iowa, 342. It is immaterial whether the wife's allowance be secured by deed or not, since it is the payment which discharges the husband. 4 Camp. 70; *Emery v. Neighbour*, 2 Halst. (N. J.) 142; 2 Car. & K. 437. If the wife makes no claim for further support, nor offers to return, all the more does the arrangement protect him from liability. *Alley v. Winn*, 134 Mass. 77. On account of the increasing favor with which separation deeds are held, allowance of maintenance by a formal separation deed appears under the latest decisions to be treated as conclusive of the extent and method of a husband's liability for his wife's support during their separation. *Eastland v. Burchell*, L. R. 3 Q. B. D. 432. And see *Hunt v. Hayes*, 64 Vt. 89 (adequate means for the wife under an antenuptial settlement). An arrangement with some third party may thus fulfil the needful conditions of support where the spouses live apart. § 68.

<sup>3</sup> § 69; *Johnston v. Sumner*, 3 H. & N. 261; 7 W. & S. (Penn.) 83;

regard the rule of good faith in matters relative to the wife's necessities.<sup>1</sup>

76. In fine, the common-law doctrine, as we have seen, makes the ground of the husband's liability for his wife's necessities essentially that of agency. And, to reconcile the earlier and later decisions, the strict analogies of an agency are now transcended, and the wife's right of procuring necessities on her husband's credit may be deduced from these two combined considerations: (1) That where the husband proves remiss in furnishing needful support, the wife has the right to compel such support by pledging his credit, whether they cohabit or dwell apart, so long as misconduct on her part has not absolved him from the conjugal duty, — this rule of compulsion taking largely the place, in modern times, of the old remedies formerly pursued in the ecclesiastical courts; (2) That any wife may be the agent of her husband and bind him to the extent of her authority, like other representatives. In short, the rule of agency as to wife's necessities is carried far enough in actual practice to make that agency a fiction for the sake of a wife's self-protection against her unfaithful spouse.<sup>2</sup>

11 Ga. 324; 25 Ill. 503; 53 N. J. L. 516; *Stevens v. Story*, 43 Vt. 327; *Sturtevant v. Starin*, 19 Wis. 268; 132 Mass. 181; 38 Neb. 304. See also the rule of *Debenham v. Mellon*, L. R. 5 Q. B. D. 394; *Wanamaker v. Weaver*, 176 N. Y. 75.

Mere temporary absence or a doubtful separation may keep the presumption of agency as before, unless notice to former dealers is duly given by way of caution. § 69; 13 Vt. 202; 3 Esp. 250; 17 R. I. 188; 11 Wend. (N. Y.) 33. And see 8 C. & P. 717 (special agreement with tradesman). A seller who has never dealt with the parties before should take especial caution. *Olson Co. v. Youngquist*, 76 Minn. 26.

<sup>1</sup> *Walker v. Loughton*, 11 Fost. (N. H.) 111; 1 Allen (Mass.), 514 (request to wife to return should be sincere and consistent).

<sup>2</sup> See § 70, where this discussion is extended.

We may add that the husband's express contract with others, or his express promise or express sanction comes in aid of such legal inference concerning his liability for supplies furnished his wife as may be drawn from any of the matrimonial situations which we have considered. See *e. g.* *Daubney v. Hughes*, 60 N. Y. 187. Any notice intended to terminate the continuance of an express contract must, in order to be effectual,

77. *Marriage de facto*, or reputed marriage, is always sufficient to charge the husband with his wife's necessities. There seem to be three reasons why this should be so: one, that a tradesman cannot be expected to inquire into such matters; another, that agency binds any principal; the third, that it is just that a man who holds out a woman to society as his wife should maintain her as such.<sup>1</sup>

be appropriate thereto. *Ib.* And see *Mickelberry v. Harvey*, 58 Ind. 523.

<sup>1</sup> § 71. Hence an agency is to be inferred wherever there is cohabitation of parties as husband and wife; though not, it would appear, where the cohabitation was irregular and calculated to raise a different impression, and strong proof of actual authority bestowed is not furnished. 2 Esp. 637; 1 Camp. 245; 40 E. L. & Eq. 518; 4 Camp. 215; 89 Cal. 446.

An adult husband is bound on the contract of his minor wife for necessities. *Nicholson v. Wilborn*, 13 Ga. 467. And a minor husband is liable for necessities furnished his wife, whether she be minor or adult. *Cantine v. Phillips*, 5 Harring. (Del.) 428; 14 Ga. 687; *Commonwealth v. Graham*, 157 Mass. 73. The ordinary rules of husband and wife, therefore, apply so far as such necessities are concerned. If old enough to contract a valid marriage, an infant is presumed old enough to pay for his wife's board and lodging as well as his own. But with regard to his wife's general contracts, it would seem that infancy, which incapacitates one from making contracts in person, also disqualifies him from employing an attorney. § 71. And see Part V. c. 3. But as the obligation of a husband to support does not extend beyond his wife and own children, nor always to step-children, a wife cannot ordinarily make a binding contract to support her own parent, brother, sister, or near relatives, either at his expense or her own, since she is neither *sui juris* nor presumably his agent for that purpose. *Olney v. Howe*, 89 Ill. 556. Policy has hitherto regarded parental claims for necessities furnished to a wife with great distrust. Such claims may doubtless accrue under an express contract. *Daubney v. Hughes*, 60 N. Y. 187. But the law will not ordinarily imply a contract, as against a son-in-law, to pay his wife's board while she stays at her father's house. Some of the latest cases, nevertheless, imply a promise on the husband's part to pay his wife's board, where she goes to her parent's house upon a mutual understanding that she may stay there indefinitely, the spouses having quarrelled. § 71; *Burkett v. Trowbridge*, 61 Me. 251; *Daubney v. Hughes*, 60 N. Y. 187.

The claim for a wife's necessities involves two elements: articles furnished must be of the suitable class, such as food, dress, or medical attendance; and, furthermore, of that class the wife must be destitute of such supply as befits her condition and the means and station of her husband. Where one has supplied the wife with articles, some of which are

78. On general principle, the wife as agent may bind her husband for other contracts than those for necessities, where due authority in the premises, express or implied, can be shown. The natural incapacities of her sex superadded to those of the marriage state; the practical difficulties which persons dealing through such an agent must encounter, particularly where they find she has exceeded her authority, and yet cannot hold her liable in person; her own exposure to fraud, deceit, and coercion, — all these combine to render the wife in important negotiations an undesirable business representative; and cases of this sort come rarely before the courts. Yet the intimate relations of spouses favor the mutual intent of an occasional agency for each other.<sup>1</sup> As to matters not relating to the household or the family necessities, a wife has no power to bind her husband unless actual authority has been expressly conferred or may be implied from circumstances.<sup>2</sup> But the wife may be delegated an attorney, even under a sealed instrument.<sup>3</sup> And on principle there is little reason to doubt her capacity to bind her husband in all general transactions where he has given an express authority, and especially in all purchases made for the household. So, too, her agency may be inferred from his acts and conduct respecting her; and the general rule applies that such agency is to be measured by the scope of the usual employment;<sup>4</sup> and further, that those regularly dealing upon

necessaries and some are not, some of which were rightly furnished her and some of which were not, he can yet recover for the necessities, or for what he rightly furnished. *Eames v. Sweetser*, 101 Mass. 78; *Roberts v. Kelley*, 51 Vt. 97. But on the other hand, one cannot furnish articles which were not necessities and not suitable, and recover a fraction of their value on the plea that they might have answered the purpose of other articles which would have been necessities. *Thorpe v. Shapleigh*, 67 Me. 235.

<sup>1</sup> 75 Conn. 254; 23 Pa. Super. 428.

<sup>2</sup> § 72; *Jones v. Woche*, 90 Ky. 230; 40 Ill. App. 380.

<sup>3</sup> 42 Barb. 194.

<sup>4</sup> 4 Dev. & Batt. (N. C.) 180; 3 Whart. (Penn.) 369; 10 Allen (Mass.), 539; 38 E. L. & Eq. 515; 6 N. H. 124; 11 Vt. 628; 12 Wend. (N. Y.) 433; *Mickelberry v. Harvey*, 58 Ind. 523.



the sanction of an agency ought to have due notice when the agency is revoked.<sup>1</sup> Ratification by the husband is not

<sup>1</sup> As where the parties separate, but the regular dealer has no knowledge of the fact. 23 Ore. 327.

The usual cases in which a wife binds the husband on contracts not for necessities may be reduced to two classes: the one where the nature of his employment is such that the wife is expected to share in it; the other where he is absent from home and some one must carry on the household and small business matters. § 72; Schouler, *Hus. & Wife*, §§ 127-130. Where a husband permits his wife to carry on a certain business in his name, and to draw in his name checks and notes to be used in the course of the business, she cannot make him liable as surety for loans to third persons, or upon accommodation paper, merely because of such an agency; nor can she be assumed a partner. *Gulick v. Grover*, 2 Vroom (N. J.), 182; 4 Vroom, 463. And where her agency extends only to the performance of certain specific acts of a general transaction, she cannot bind him by her acts and admissions respecting other matters connected with the general transaction. *Goodrich v. Tracy*, 43 Vt. 314. A wife is fairly the husband's implied agent for engaging the usual menial servants *Wagner v. Nagel*, 33 Minn. 348. The husband may, by suitable conduct, make his wife his agent for receiving settlement of claims due him while absent; or for employing legal assistance as incidental to managing his affairs. *Stall v. Meek*, 70 Penn. St. 181; 39 Vt. 306; *Buford v. Speed*, 11 Bush (Ky.), 338. The wife may be her husband's agent as to his real estate, not only for the purpose of collecting rents and making small repairs, but in the more important transactions. But as deeds and written instruments are here commonly requisite, and formalities must be followed, little can be left to inference. The management of a farm in a husband's long absence, with the care of the stock, is not unfrequently intrusted to the wife. *Chunot v. Larson*, 43 Wis. 536; *McAfee v. Robertson*, 41 Tex. 355. It is not to be presumed that a wife can revoke her husband's license on his premises, given to a third person, nor grant an irrevocable license thereon. *Kellogg v. Robinson*, 32 Conn. 335; *Nelson v. Garey*, 114 Mass. 418. The wife may represent her husband, not only in the general management of his own property, so as to bind him, but, under certain circumstances, with reference to her property in which he has the usual marital rights, or lands owned partly by her and partly by him. 38 Vt. 515; *Dresel v. Jordan*, 104 Mass. 497. But a wife is not, simply because she is a wife, authorized by implication to sell or dispose of her husband's general personalty, although it might consist of a sewing-machine or a piano such as she herself used exclusively. *Wheeler Man. Co. v. Morgan*, 29 Kan. 519; 96 Mo. App. 693.

On the whole the question is one of fact; and the husband's station in life may bear upon such questions. 70 N. Y. S. 19 (wife of a laboring man).

essential where the scope of the wife's agency was sufficient without it; but it cures acts of doubtful authority.<sup>1</sup>

79. A marriage of debtor and creditor has the effect of extinguishing, not suspending the debt, at common law; and this whether the debtor was wife or husband.<sup>2</sup> But this rule does not affect the rights of third parties.<sup>3</sup>

<sup>1</sup> § 72; 41 Tex. 355. The wife's sale or gift of her husband's personal property, even without authority, or her purchase on his behalf, may be confirmed by his subsequent acts amounting to ratification; and one mode of ratification is to accept knowingly the benefits of her transaction. *Dunnahoe v. Williams*, 24 Ark. 264; *Mickelberry v. Harvey*, 58 Ind. 523; *Pike v. Baker*, 53 Ill. 163; *Shaw v. Emery*, 38 Me. 484. And see 38 Vt. 156 (trifling gift for charity). Acts done by the wife in relation to her husband's property without authority should of course be promptly disavowed by him within a reasonable time, if he wishes to escape responsibility. *Hill v. Sewald*, 53 Penn. St. 271. Nor can a husband stand by and see his wife use the proceeds of a sale of his property sold by her with his knowledge, and afterwards reclaim the property. *Delano v. Blanchard*, 52 Vt. 578; *Huff v. Price*, 50 Mo. 228.

<sup>2</sup> § 73; *Smiley v. Smiley*, 18 Ohio St. 543.

<sup>3</sup> As to indorsement or assignment of such a debt, or its evidence before marriage, cf. *Guptil v. Horne*, 63 Me. 405; *Long v. Kinney*, 49 Ind. 235. And see *Price v. Price*, L. R. 11 Ch. D. 163.

## CHAPTER IV.

### EFFECT OF COVERTURE UPON THE WIFE'S INJURIES AND FRAUDS.

80. Injuries and frauds may have been committed by the wife; or they may have been committed upon the wife. Again, they may have been committed before coverture; or they may have been committed during coverture. Once more, they may have reference to the person, constituting a bodily injury, such as assault and battery, or an injury to the character, such as slander; or they may have reference to property. But in any event, so far as the injury or fraud is made the subject of a civil suit, the general principle of the wife's disability remains the same; namely, that while marriage lasts the husband compensates or receives the compensation.<sup>1</sup>

81. As to private wrongs or torts, the general rule of law is that the husband is liable for the frauds and injuries of the wife, whether committed before or during coverture; if committed under his coercion or by him alone, he, and he alone, is liable; otherwise, both are, for the time being, liable.<sup>2</sup> Where the fraud or injury is committed in his company and by his order, coercion is presumed, and the husband becomes, *prima facie*, the only wrong-doer; and where committed without his order, and in his absence, or voluntarily in his presence, the wife is in reality the offending party, while the husband has become responsible for her

<sup>1</sup> § 74.

<sup>2</sup> § 75; 15 Ill. 403; *Carl v. Wonder*, 5 Watts (Penn.), 97; 6 N. H. 543; 4 Ala. 136; 1 McCord (S. C.), 578; 3 Miss. 86; *Cassin v. Delany*, 38 N. Y. 178; *Ball v. Bennett*, 21 Ind. 427; *Marshall v. Oakes*, 51 Me. 308; *Clark v. Bayer*, 32 Ohio St. 299; 44 Ark. 401; *Flesh v. Lindsay*, 115 Mo. 1.

As to modern statutory changes in this doctrine, see c. 12, *post*; § 170 n.

acts by reason of her coverture. In the latter class of cases the husband is properly joined with his wife in the suit; for, if the wife alone were sued, his property might be seized without giving him an opportunity for defence; and if the husband alone were sued, he would become chargeable absolutely, no matter how long the marriage lasted.<sup>1</sup> In the former class of cases the husband should be sued alone.<sup>2</sup> Where the tort is committed by both spouses, and the wife does not act by coercion, both husband and wife may be jointly sued.<sup>3</sup> The presumption of coercion is much the same in civil as in criminal offences.<sup>4</sup> It is said that the privilege of presumptive coercion extends to no other person than a wife, not even to a servant.<sup>5</sup> The presence of the husband and his direction should usually be concurrent, in order to amount to coercion; and the presumption of a wife's coercion in a tort is, of course, not conclusive, but may be controlled by evidence of the facts.<sup>6</sup>

**§ 2.** But the husband's liability is after all a limited one, where he, in the first instance, was free from actual wrong; that is to say, that the death of the wife before the recovery of

<sup>1</sup> § 75. Here, as in the case of the wife's antenuptial debts, the wife is "under cover"; in form, she is liable to suit with her husband, and the consequences of a judgment depend upon whether the cover is taken off meanwhile or not.

<sup>2</sup> 2 Bailey (S. C.) 411; 2 E. D. Smith (N. Y.), 90; *Jackson v. Kirby*, 37 Vt. 448; 58 Vt. 323.

<sup>3</sup> 12 Mod. 246; *Marshall v. Oakes*, 51 Me. 308; Gray, C. J., in *Handy v. Foley*, 121 Mass. 259.

<sup>4</sup> *Supra*, 52; Gray, C. J., in *Handy v. Foley*, 121 Mass. 259; 2 Kent, Com. 149.

<sup>5</sup> *Busbee* (N. C.), 15; *Griffin v. Reynolds*, 17 How. (U. S.) 609.

<sup>6</sup> *Cassin v. Delany*, 38 N. Y. 178; *Ferguson v. Brooks*, 67 Me. 251; *Henderson v. Wendler*, 39 S. C. 555. Coercion, if relied upon, should be set up in defence. See *Clark v. Bayer*, 32 Ohio St. 299; *Ferguson v. Brooks*, 67 Me. 251.

We have seen that the husband is not criminally answerable for his wife's crimes. *Supra*, 52. Why then should he be for her private wrong? The answer of the law is, as in case of her debts *dum sola*, that he adopts her and her circumstances together while the marriage lasts; taking her fortune, if she has one, and assuming all possible liabilities therefrom.

**§ 75.**

damages puts an end to his liability altogether. This is correct, not only on the principle announced in the case of the wife's debts *dum sola*, but because wrongs, being personal, die with the person, which last is the common explanation of this rule.<sup>1</sup> If the husband dies before damages are recovered in the suit, the cover comes off and the wife remains exposed and solely liable.<sup>2</sup>

**82 a.** Torts by the wife may be based on contract, with fraud as the substantive basis, instead of being *torts simpliciter*, or simple wrongs at law. The common law has been supposed to apply with the same force in both cases, partly because in the latter instance the person injured would be otherwise without a remedy.<sup>3</sup> But some modern cases rule that though the husband is liable for the wife's general frauds, yet when the fraud is directly connected with her contract, and is the

<sup>1</sup> § 75; 48 Wis. 323. But as to a suit referable to her breach of contract, see 14 Ind. 595; 82.

<sup>2</sup> § 75; *Stroop v. Swarts*, 12 S. & R. (Penn.) 76; *Baker v. Braslin*, 16 R. I. 635.

So it would seem that the common law recognizes a liability on her part which continues through the marriage relation; coverture operating, however, so as to suspend the remedy against the married woman, and to bring in as a joint party the custodian of her fortune. Hence husband and wife are sued together for the libel or slander of the wife. *McElfresh v. Kirkendall*, 36 Iowa, 224. Exemplary damages may be allowed in such action. *Fowler v. Chichester*, 25 Ohio St. 9. As to the wife's publication of a libel, see 64 Vt. 450. They are sued for forfeitures under a penal statute where she participated. 4 Cush. (Mass.) 273; 27 Tex. 463; 44 Ill. 42; 18 Iowa, 86. As to suits to recover penalties for usury, see *Jackson v. Kirby*, 87 Vt. 448; 43 Barb. 422. So, too, for a wife's assault and battery. *Griffin v. Reynolds*, 17 How. (U. S.) 609; *Roadcap v. Sipe*, 6 Gratt. 218; 16 R. I. 635. Or for the forcible removal of a gate. *Handy v. Foley*, 121 Mass. 259. The fact that the husband is made responsible by the fact of coverture, and did not commit the wrong in person, cannot go in mitigation of damages. *Austin v. Wilson*, 4 Cush. 273; 58 Vt. 558. See 17 R. I. 81. And cf., as to torts connected with the wife's land, as in keeping a vicious dog, 152 Mass. 7; 135 N. Y. 201.

The husband has full management of the defence. And we need hardly add that he may compromise without his wife's assent. *Coolidge v. Parria*, 8 Ohio St. 594.

<sup>3</sup> § 76; 5 Car. & P. 484, per Tindal, C. J.; 44 Mo. App. 583.

means of effecting it, and part and parcel of the same transaction, the wife cannot be responsible, nor can the husband be sued for the fraud together with the wife.<sup>1</sup>

**83. As to torts committed upon the wife.** So far as the husband is injured, his right of action is sole; but where the wife is the meritorious cause of action, the spouses join as plaintiffs. For injuries to the person or character of the wife, therefore, the husband and wife at the common law should sue together. And it may happen, where both were personally injured together, that the husband has one cause of action as an individual, and another founded upon his wife's injury.<sup>2</sup> The damages allowed as compensation for the frauds and injuries sustained by the wife go to the husband, as well as the rest of her personal property, if recovered during his lifetime.<sup>3</sup> But such suits survive to her where

<sup>1</sup> *Liverpool Loan Association v. Fairhurst*, 9 Exch. 422; 25 Fla. 927; 52 A. (N. J.) 303. There are cases where the wife will bind her husband by her fraudulent representations on the ground of her agency. 8 Car. & P. 316; Schouler, *Hus. & Wife*, § 136. Cf. *Krumm v. Beach*, 96 N. Y. 398 (husband as wife's agent); 172 Mass. 199. A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself. *Choen v. Porter*, 66 Ind. 194. But where there is no collusion apparent, a husband will not be committed for his wife's breach of injunction. L. R. 7 Eq. 254. Where the husband administers some trust on the part and in the right of his wife, he is liable in equity for losses occasioned by her breaches of trust. *Bahin v. Hughes*, 31 Ch. D. 390. See 112 Ga. 93.

For statutory changes as to torts and frauds of the wife, see c. 12, *post*; 152 Mo. 434; § 170 n. Apart from clear statutory expression the old doctrine applies. 66 Ohio St. 395; 113 Wis. 508.

<sup>2</sup> § 77. But where the right of action for damages is founded on the prior possession of personal property, the husband must, at common law, sue alone, since his possession is the possession of both. § 77; *Cro. Eliz.* 133. And the joinder of the wife in actions relating to personal property, where the injury was committed after marriage, is good ground of demurrer, or motion to arrest, or even of error after judgment. *Rawlins v. Rounds*, 27 Vt. 17. As to applying this principle to property of the wife parted with before marriage, see § 77 and cases cited; 3 Rob. Pract. 188.

<sup>3</sup> § 77. As to injuries relative to the wife's real estate, see *infra*, ch. 6. Husband and wife must sue together for libel or slanderous words spoken against the latter. 2 Monr. (Ky.) 56; *Davies v. Solomon*, L. R. 7 Q. B.

she is the meritorious cause of action; and on the death of the husband, pending legal proceedings, the wife may accordingly proceed to judgment and collect the damages for herself; or if her husband had never brought an action, she may then do so in her own right.<sup>1</sup> The husband, on the other hand, has no such interest in the suit at common law that he may

112; *Harper v. Pinkston*, 112 N. C. 293; 3 Blackf. (Ind.) 383. These words must be actionable *per se*. See *Beach v. Ranney*, 2 Hill (N. Y.), 309; 4 B. & Ad. 514; 12 Vt. 51. As to slander of wife charging her with "adultery," see *Shafer v. Ahalt*, 48 Md. 171. Special damage should be shown in order to sustain the action. *Ib.*; 2 L. T. N. s. 290. Words charging her, while unmarried, with fornication are jointly actionable. *Gibson v. Gibson*, 43 Wis. 23. They sue together for assault and battery of the wife. 5 Barb. 156; 60 Tex. 331 (that husband lives apart or refuses to join cannot avail the wife). Also for injuries sustained by her through the negligence of a carrier. *Heirn v. McCaughan*, 32 Miss. 17; *Blair v. Chicago R.*, 89 Mo. 334. Also for the malpractice of a physician, even though it afterwards cause her death. 2 Root (Conn.), 90; *Hyatt v. Adams*, 16 Mich. 180. See *State v. Housekeeper*, 70 Md. 162. Also for frauds upon the wife, as in case of an action *qui tam* to recover penalties for a fraudulent conveyance. 3 Conn. 320. But see 8 Jones (N. C.), 32, as to negligence "sounding in contract," not admitted to be cause of action. Also for malicious prosecution. *Laughlin v. Eaton*, 54 Me. 156.

And the rule is the same in all these cases, whether the fraud or injury was committed before or during coverture. But if the wife be a privy to the wrong, or culpably suffer an injury to be committed upon her, the husband cannot maintain his action; for his right to damages cannot be greater than hers would have been had she remained single. 5 Barb. 156. Nor can an action be maintained where the husband instigates the wrong. 2 Grant (Penn.) Cases, 39. Nor in slander where the words are not actionable, though the wife become ill in consequence of the slander. *Wilson v. Goit*, 17 N. Y. 442. In a joint action for personal wrong to the wife, the declaration should conclude "to their damage." *Horton v. Byles*, 1 Sid. 387; *Smalley v. Anderson*, 2 Monr. (Ky.) 56. And it is a well-recognized principle, both in England and America, that whenever the wife is the meritorious cause of action, her interest must appear on the face of the pleadings, or the omission will be considered fatal. 5 B. & P. 405; *Thorne v. Dillingham*, 1 Denio (N. Y.), 254; *Pickering v. De Rochemont*, 45 N. H. 67. Cf. 57 Md. 121.

Where the tort was committed before the woman was married, the action, if she marries afterwards, should be brought by husband and wife; or if she marries pending the action, the husband is entitled to be admitted as a plaintiff. *Gibson v. Gibson*, 43 Wis. 23.

<sup>1</sup> § 77; 2 Ld. Raym. 1208; 11 Bush (Ky.), 327.

prosecute it in his own name after his wife's death. His joinder in the first place was only because of the marriage relation.<sup>1</sup>

84. Two separate causes of action may arise from injuries inflicted upon the wife's person, since the husband is at the common law entitled to the society and services of his wife. One, in the name of both for her own injuries, we have just considered; the other is in the name of the husband alone *per quod consortium amisit*.<sup>2</sup> Thus, if the wife be wantonly bruised and maltreated, her husband may bring his special action *per quod* for the loss of her society and for his medical expenses.<sup>3</sup> But there can be no special damage recovered by the husband by way of aggravation in the joint suit for his wife's injuries, which is founded in her meritorious claim.<sup>4</sup> Where the husband is alone entitled to the damages, and in case of his death they would go to his representatives, he

<sup>1</sup> He may, however, under some statutes, be let in as her administrator, and in such capacity prosecute the suit to its conclusion. 50 Me. 87; *Pattee v. Harrington*, 11 Pick. (Mass.) 221; 51 N. H. 71. If the wife dies after judgment, the husband surviving may take the benefits of the suit; for a judgment debt takes the place of the original cause of action.

<sup>2</sup> § 77; 3 Bl. Com. 140; *Mewhirter v. Hatten*, 42 Iowa, 288; *Brockbank v. Whitehaven Junction R.*, 7 H. & N. 834; *Whitcomb v. Barre*, 37 Vt. 148; 24 Wis. 618; *Hooper v. Haskell*, 56 Me. 251.

<sup>3</sup> Modern legislation should be explicit to deprive the husband of his special action. As to the "society" lost, the law means a wife's capacity for comfort and usefulness to her husband. 102 Mo. 669; *Kelley v. Mayberry*, 154 Penn. St. 440; 121 Ind. 375; 91 Ga. 466, 813. Not a mere servant's service is here recovered. *Selleck v. City of Janesville*, 104 Wis. 570.

<sup>4</sup> Thus, in the joint action for an assault on the wife, the surgeon's bill cannot be recovered; if for slander of the wife, the loss of wages cannot be claimed; there the sole right of the husband should be sued on in his name. 4 M. & W. 6; *Kavanaugh v. Janesville*, 24 Wis. 618; *King v. Thompson*, 87 Penn. St. 365. See 18 Johns. (N. Y.) 443. Nor, on the other hand, can the husband recover for the wife's mental anguish or other damages incidental to the joint suit, in his sole suit for damages. *Hooper v. Haskell*, 56 Me. 251. *Semble*, the husband may release the damages for his wife's injuries, and then recover for the loss arising to himself alone; he may in general release or compromise. 7 Mass. 95; 11 Bush (Ky.), 327.



must sue alone; and his sole suit will not be defeated by his wife's death before action brought.<sup>1</sup>

85. *Instantaneous death of the husband or wife gave, at the common law, no right of action to the survivor. Nor could the husband, whose wife was thus killed by another's carelessness, sue per quod, because he could not be said to have lost her society during any portion of her life.*<sup>2</sup> A wife, of course, could not sue for the death of her husband.<sup>3</sup> Modern legislation has supplied many new remedies much needed in these classes of cases, particularly with reference to injuries and loss of life occasioned through the carelessness of railroad companies and other passenger carriers.<sup>4</sup>

<sup>1</sup> *Wheeling v. Trowbridge*, 5 W. Va. 353.

Of the suits which the husband may bring for loss of his wife's society, that for enticing a wife away has already been considered. *Supra*, 43. Somewhat akin to this is his action for his wife's seduction, founded on the same general marital rights. But the common law still keeps up its legal fiction of the wife's civil incapacity, and treats the seducer as guilty of trespass by force of arms, whether the wife actually consent to the guilt or not. 3 Bl. Com. 139, 140. See *Chamberlain v. Hazelwood*, 5 M. & W. 517. A husband who lives apart from his wife, under articles of separation or a decree of divorce from bed and board, cannot maintain a suit for damages *per quod*, since he has suffered no loss of her society. § 77; *Schouler, Hus. & Wife*, § 140; *Ballard v. Russell*, 36 Me. 196; *Burger v. Belsley*, 45 Ill. 72. And see *Neilson v. Brown*, 13 R. I. 651 (keeping husband from funeral, etc.). The wife was never permitted to sue for the loss of her husband's society and services; though on general principle it is hard to see why, save for her coverture, she should not have been. 2 Kent, Com. 182; 42 Iowa, 518; *Carey v. Berkshire R.*, 1 Cush. (Mass.) 475; 6 Exch. 761. Cf. 26 Fed. (U. S.) 13; 16 Col. 523; § 77. As to a wife's loss of time, see 79 N. W. 271.

<sup>2</sup> *Yelv.* 89, 90; *Baker v. Bolton*, 1 Camp. 493; *Green v. Hudson R. R. Co.*, 28 Barb. 9; *Hallenbeck v. Berkshire R.*, 9 Cush. 109. See *Georgia R. R. Co. v. Wynn*, 42 Geo. 331, which considers a statute providing only for a wife's suit by reason of her husband's death, by railroad accident, and not for a husband's suit by reason of his wife's death.

<sup>3</sup> 2 Kent, Com. 182; *Carey v. Berkshire R.*, 1 Cush. 475. Where the wife dies in consequence of one's carelessness, as in case of malpractice, the husband may recover damages for the injury accruing to himself before, but not for the injury in consequence of, the death. *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595.

<sup>4</sup> § 78. And wherever by special statute some right of action for dam-

86. As to actual marriage a distinction is made between the wife's general contracts and her frauds and injuries. In the one case the man is held liable to third parties for her acts as agent, even though never married to her; and simple cohabitation is sufficient to charge him.<sup>1</sup> But simple cohabitation will not be enough to make him responsible for her civil injuries. Marriage in fact is here essential. And this latter principle applies likewise where he seeks indemnity for her injuries.<sup>2</sup> The facility with which an agency is created at law for contracts may serve to explain the difference between the two cases.

ages is given (as against a town for a defective highway), some of our courts seem disposed to allow the husband's medical expenses by way of aggravation, in the joint suit of husband and wife, even though he may not be empowered to bring a suit in his own name to recover for them as damages *per quod*. 4 Cush. (Mass.) 310; 32 Me. 536; 36 Wis. 154; 21 Conn. 557. See 38 Vt. 440. In some of these statutory cases, however, the husband may bring his separate suit *per quod* as before, in addition to the suit for the wife's injury. 26 N. J. Eq. 474; 24 Wis. 618; 37 Vt. 148.

Where husband and wife were injured simultaneously, and both died, the husband a little before the wife, it was held that the right of action vested absolutely in the wife. *Waldo v. Goodsell*, 33 Conn. 462. Where the action is brought in *assumpsit*, as upon a carrier's contract to carry safely, the considerations are those of contract, not tort. See *Pollard v. New Jersey R.*, 101 U. S. 223. Recovery by the administrator for personal injury caused by the wife's death enures to the benefit of the surviving husband under some State codes. 8 Lea (Tenn.), 96.

Wherever husband and wife are both injured by the same party, they have two distinct and separate causes of action, which must not be confounded. Thus, for libel against husband and wife, the husband must sue alone for the libel against him, and husband and wife jointly for the libel against her; they cannot sue together for the libel against both. 11 Cush. (Mass.) 10; 3 Binn. (Penn.) 555; 2 Ld. Raym. 1208; *Skogland v. Street R.*, 45 Minn. 330. For statutory changes as to injuries sustained by the wife, see c. 12, *post*; § 170 n.; 18 Q. B. D. 784. And so it is in suits for personal injury to both. *Northern Central R. v. Mills*, 61 Md. 355; *Matthew v. Central Pacific R.*, 63 Cal. 450. But actions are sometimes consolidated in practice. 3 Hurl. & C. 745. Whether a husband's contributory negligence shall bar the joint suit for his wife's injuries is a novel and interesting point. See 55 N. J. L. 577; § 79.

<sup>1</sup> *Supra*, 77.

<sup>2</sup> 1 Ashm. (Penn.) 200. See *Norwood v. Stevenson*, Andr. 227; § 79.

## CHAPTER V.

### EFFECT OF COVERTURE UPON THE WIFE'S PERSONAL PROPERTY.

87. Personal property comprises things in possession, or goods and effects, such as money, furniture, and farm stock, which one holds as the property itself, and things in action, such as bonds and other outstanding debts.<sup>1</sup> The husband's title to his wife's personal property at the common law is either absolute or qualified, according as the particular property belongs to the one class or the other. We shall therefore, in this chapter, treat of, (1) the wife's things or personal property in possession; (2) her things or personals in action.

88. In general the wife's personal property goes to the husband, whether belonging to her at the time of marriage, or acquired afterwards by gift, bequest, or purchase; whether actually or beneficially possessed; whether principal fund or income. So her earnings belong to her husband. Marriage, therefore, operates in this respect as a gift to the husband; and while the gift is only qualified, as we shall see, so far as things in action are concerned, it lies in his power to make the gift absolute during coverture.<sup>2</sup> This privilege of the husband lasts as long as the marriage relation continues, even though he be living apart from his wife in

<sup>1</sup> 2 Bl. Com. 389, 396; 2 Kent, Com. 351. See 1 Schouler, Pers. Prop. §§ 11, 12, where the leading distinctions between "things in possession" and "things in action" are noticed at length, and where reasons are stated why the terms "corporeal" and "incorporeal" personal property should be preferred at this day.

<sup>2</sup> § 80; 2 Kent, Com. 130, etc.; *Campbell v. Galbreath*, 12 Bush (Ky.), 450.

adultery, and she acquire the property by her own labor<sup>1</sup> or by bequest.<sup>2</sup> And it is a matter of course that the wife's property should be hers in her own right, in order that the husband's title may attach. For property may come to her with restrictions upon the husband's rights, such as the giver has seen fit to impose.<sup>3</sup> Her *paraphernalia* follow a rule somewhat peculiar.<sup>4</sup> And, as we shall see in later chapters, much of the common law bearing upon this subject is practically superseded by the law of the wife's separate property.

89. **Earnings of the wife belong to the husband;** for the rule of the common law is that he takes all the benefits of her industry.<sup>5</sup> This rule applies to money earned, and to other produce of the wife's earnings.<sup>6</sup> He alone can give a discharge for any demand which may arise from her services. He may of course constitute her his agent for receiving the pay to herself; but, without evidence of some such authority, the person who employs her, as a nurse for instance, cannot protect himself by showing her separate receipts.<sup>7</sup> For a wife's earnings the husband sues alone, and in his own name.<sup>8</sup> And where the husband supports his household, all claims upon a boarder or lodger are presumably on his behalf.<sup>9</sup>

<sup>1</sup> 7 Pick. (Mass.) 65; 2 J. J. Marsh. (Ky.) 82; *Armstrong v. Armstrong*, 32 Miss. 279.

<sup>2</sup> *Vreeland v. Ryno*, 26 N. J. Eq. 160. Neither divorce from bed and board, nor separation, takes away his right. 10 Pick. (Mass.) 429; *Prescott v. Brown*, 23 Me. 305. But divorce from the bonds of matrimony, or the death of either party, puts an end to the gifts of coverture, leaving open the adjustment of the rights of the respective parties with one another, or between the survivor and the representatives of the deceased, on other principles to be hereafter explained. § 90. See *Divorce*, *infra*, c. 17.

<sup>3</sup> Co. Litt. 351; 11 Mod. 178.

<sup>4</sup> See *post*, cs. 15, 16, as to rights upon death of a spouse.

<sup>5</sup> § 81; 88 N. C. 463; *Gorman v. Wood*, 73 Ga. 370; *McDavid v. Adams*, 77 Ill. 155; *Yopst v. Yopst*, 51 Ind. 61.

<sup>6</sup> *Bucher v. Ream*, 68 Penn. St. 421; *Hawkins v. Providence R.*, 119 Mass. 596.

<sup>7</sup> § 81; 2 Man. & Gr. 172; 7 Pick. (Mass.) 65. But see 17 S. & R. 130.

<sup>8</sup> *Gould v. Carlton*, 55 Me. 511; *McDavid v. Adams*, 77 Ill. 155.

<sup>9</sup> *Barnes v. Moore*, 86 Mich. 585; 24 R. I. 421; *Reynolds v. Robin*

90. (1) As to the wife's choses or personals in possession, or corporeal personal property, the husband's right at common law is immediate and absolute. He may dispose of them as he sees fit during his life, whether with or without his wife's consent; he may bequeath them by will; and after his death such property is regarded as assets of his estate, the title passing to his executors and administrators, to the exclusion of the wife, though she survive him.<sup>1</sup> Such chattels bequeathed to the wife, without restriction, pass to the husband at once like her other things in possession.<sup>2</sup> So all her

son, 64 N. Y. 589. The husband may consent that the wife's earnings be her own, but that right rests upon his consent, and raises other questions to be considered hereafter. See *post*, c. 12; 80 Ala. 476 (revoking a gift not consummated). Nor can that consent be exercised in disregard of his existing creditors. 2 C. E. Green (N. J.), 367; *post*, c. 14; 56 Ala. 379; 81 Ala. 489, 549. It follows that the proceeds of the joint labor of husband and wife belong at common law to the husband; as where, for instance, they raise cotton together. *Bowden v. Gray*, 49 Miss. 547. Cf. as to modern legislative changes, c. 12, *post*. Notwithstanding permissive statutes as to the wife's earnings, the law favors a husband's suit against third parties, where the wife did not make the contract, or sets up no separate claim. *Porter v. Dunn*, 131 N. Y. 314; 118 N. Y. 304; 76 Ga. 104; *Howe v. Hyde*, 88 Mich. 91. An action by a husband in his own name, for his own services and his wife's, rendered under the same contract, is well brought at the common law. *Harrington v. Gies*, 45 Mich. 374.

<sup>1</sup> § 83; 2 Kent, Com. 143; 8 Mass. 99; 8 Ves. 599; 2 Dev. (N. C.) 360; 14 Conn. 99; *Skillman v. Skillman*, 2 Beasley (N. J.), 408; *Hopkins v. Carey*, 23 Miss. 54; 30 Barb. 47; *Carleton v. Lovejoy*, 54 Me. 445; 85 Va. 429. If the wife's interest in personal property be that of an owner in common, the husband becomes an owner in common in her stead. 18 Ala. 299. So corporeal chattels of a female ward, in the hands of her guardian, being legally hers at the time of marriage, become her husband's, and his marital rights attach at once, notwithstanding the guardian retains possession longer. *Sallee v. Arnold*, 82 Mo. 532; 17 Ala. 726; 14 Ind. 62. And see *Davis's Appeal*, 60 Penn. St. 118. The wife's vested remainder in personal estate goes to the husband on termination of the particular estate. *Tune v. Cooper*, 4 Sneed (Tenn.), 296. But the husband cannot be considered a purchaser by marriage for a valuable consideration against a legal title admitted to be valid by his wife before marriage. *Willis v. Snelling*, 6 Rich. (S. C.) 280.

<sup>2</sup> 9 Paige (N. Y.), 363; 4 M. & C. 408; *Crane v. Brice*, 7 M. & W. 183.

movables, such as jewels, household goods, furniture, and the like, also cash in her hands, go to him absolutely and at once, whether owned by the wife at the time of marriage or nominally vesting in her at some period of her coverture.<sup>1</sup> Therefore, should the husband die without recovering such specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship.<sup>2</sup> The true test of the husband's title is this: whether the personal property in question was or was not technically a thing in possession, or corporeal.<sup>3</sup>

91. (2) The husband's right to his wife's incorporeal personal property — or at least to her *choses in action*, as they are commonly called — is qualified. Marriage operates, not as an absolute gift of such property, but rather as a conditional gift, the condition being that the husband shall do some act while coverture lasts, to appropriate the *chose* to himself. If he happen to die before he has done so, such *choses* as have not been reduced to possession but are outstanding, remain the property of the wife, and his personal representatives have no title in them.<sup>4</sup> With respect to such things in

<sup>1</sup> As to the distinction between money on general deposit and a specific deposit upon a bailment, see 1 Mer. 543, n.; Schouler Bailm. § 14; § 82.

<sup>2</sup> *Hawkins v. Providence R.*, 119 Mass. 596.

<sup>3</sup> § 82.

As to the wife's personal apparel, except for her *paraphernalia*, it would appear that this belongs to her husband at common law together with the obligation of supplying it; and he only can sue others for its loss. See *Delano v. Blanchard*, 52 Vt. 578; 119 Mass. 596; 49 Mo. App. 127 (bride's wedding presents). She cannot sell or give her clothing away, probably, which he supplied, except by virtue of an agency; which agency, however, might be readily inferred from circumstances. But the wife's reasonable clothing belongs to the husband for the wife's use, like her victuals and other necessities, so that he must not wantonly deprive her of it so as to leave her destitute. § 82. Even conceding a wife's own title to her wearing apparel or trunk, in certain cases, the husband's special title should sufficiently sustain his suit against third parties, as bailee or agent with reference to such property; and so too where the property was partly her own. *Jacksonville R. v. Mitchell*, (1894), Fla.; 87 Mich. 62; *Gillett v. Knowles*, 97 Mich. 77.

<sup>4</sup> § 83; 7 Ves. 294; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Tritt v. Col-*

action as may accrue to the wife solely, or to the husband and wife jointly, during coverture, the same doctrine applies. The husband may disagree to his wife's interest and make his own absolute at any time during coverture by recovering by suit in his own name or otherwise reducing them to possession; but until such disagreement, such things in action belong to the wife, and, if not reduced into possession by the husband, will likewise survive to her.<sup>1</sup>

92. It becomes important, therefore, to distinguish the wife's things in action from her things in possession. To the class of things in action belong such property as rests upon obligation, contract, or other security, for payment; and not only rights presently vested and capable of immediate reduction to possession, but those which are contingent upon some event or reversionary upon some prior interest.<sup>2</sup>

well, 31 Penn. St. 228; *Needles v. Needles*, 7 Ohio St. 432; 2 Fost. (N. H.) 118. The illustration of a cover taken off when the marriage ends here serves again. If the wife die before the husband has reduced the *chose* to possession, it goes, strictly speaking, to her administrator. *Walker v. Walker*, 41 Ala. 353; *Fleet v. Perrins*, L. R. 3 Q. B. 536; L. R. 19 Eq. 369. But the husband has commonly the right both to administer and inherit a good part, at least, of his wife's personal property. See c. 15, *post*; 110 Ind. 31.

<sup>1</sup> 2 P. Wms. 497; 9 Ves. 174; 2 Kent, Com. 135; 21 Ind. 404; *Moody v. Hemphill*, 75 Ala. 268. Reduction during the minority of an infant husband is good, though he dies before majority. 18 Gratt. (Va.) 670. As to reduction by the husband of an infant wife, see *Shanks v. Edmondson*, 28 Gratt. 804.

<sup>2</sup> § 83. Debts owing the wife, arrears of rents, of profits, and of income, also outstanding loans, are plainly *choses in action*. 10 Pick. (Mass.) 463. Money due on mortgage is, before foreclosure, a *chose in action*, and even though lent before coverture with covenants running to the wife's heirs or executors, it must follow the usual rule. *Rees v. Keith*, 11 Sim. 388. So are bonds and certificates of stock. *Slaymaker v. Bank*, 10 Penn. St. 373; 5 Fost. (N. H.) 340; *Cummings v. Cummings*, 143 Mass. 340. As to proceeds of the sale of a wife's dower right, see 14 Lea (Tenn.), 346. Income of a *chose in action* is as much a *chose* as the principal itself; and according to the ordinary rule the wife becomes entitled to it by survivorship. *Wilkinson v. Charlesworth*, 11 Jur. 644. Bills of exchange and promissory notes are now considered *choses in action* of a peculiar nature; and bank checks, certificates of deposit, and public secu-

The wife's *choses in action* must not be confounded with her goods or specific chattels in the hands of third parties, which, unlike her *choses in action*, vest in the husband absolutely by the marriage.<sup>1</sup> Money rights or claims generally, as for instance a claim for damages growing out of a tort committed upon the person or character of the wife, fall under our present head; also money claims under a contract.<sup>2</sup>

93. What acts on the husband's part amount to an appropriation of his wife's *choses in action*, or, in other words, constitute reduction into his possession so as to bar her rights by survivorship, is a doctrine of common law of much importance. Mere intention on his part to appropriate is not sufficient; but the purpose must be followed by some positive act asserting an ownership.<sup>3</sup> Nor is actual possession of the *chose in action* a sufficient reduction *per se*, for the husband's intention may be to hold it in the right of another.<sup>4</sup> That reduction into possession which makes the *chose* absolutely as well as potentially the husband's is a reduction into possession, not of the thing itself, but of the title to it.<sup>5</sup> Constructive possessions are not favored in law

rities of a negotiable character may be placed in the same class. 6 M. & W. 423; *Phelps v. Phelps*, 20 Pick. (Mass.) 556; *Lenderman v. Talley*, 1 Houst. (Del.) 523; *Rodgers v. Pike County Bank*, 69 Mo. 560; *Brown v. Bokee*, 53 Md. 155 (government bonds). Legacies and distributive shares due a wife are properly *choses in action*, especially if no decree of distribution has been rendered, or the estate is unsettled. § 83; 2 Kent, Com. 135; *Schouler, Hus. & Wife*, § 150 and cases cited; 10 Ves. Jr. 574, 578; *Palmer v. Trevor*, 1 Vern. 261; *Sterling v. Sims*, 72 Ga. 51; 95 Md. 602. Cf. 1 Met. (Mass.) 476; 138 Mass. 58. See *Parks v. Cushman*, 9 Vt. 320, which allows the wife's share to be attached in trustee process by the husband's creditors after a decree of distribution.

<sup>1</sup> See *supra*, 90; 1 *Schouler, Pers. Prop.* 32-37.

<sup>2</sup> *Anderson v. Anderson*, 11 Bush (Ky.), 327.

<sup>3</sup> 5 Ves. Jr. 515.

<sup>4</sup> § 84. Thus he may take the property in trust for his wife; and if so, he is accountable like any other trustee. 12 Ves. Jr. 497; 5 Whart. (Penn.) 138; 9 Ind. 347; 42 N. J. Eq. 594; 108 N. C. 724. So he may receive it as a loan from his wife, in which case he must refund it like any other borrower. His possession simply as her managing agent or executive is not a reduction. 39 Fed. (U. S.) 403.

<sup>5</sup> *Strong, J.*, in *Tritt v. Caldwell*, 31 Penn. St. 233. Thus, it is reduc-



when they tend to defeat the wife's survivorship. Yet reduction into possession of the wife's *chose in action*, unexplained by other circumstances, is *prima facie* evidence of conversion to the husband's use, and is therefore effectual.<sup>1</sup> And reduction of a fund may be sufficient upon the happening of a condition annexed to it.<sup>2</sup> The doctrine of reduction into possession offers many very nice distinctions, involving conflicting rights of considerable magnitude.<sup>3</sup>

94. The wife's equity to a settlement, which constitutes an important branch of the English chancery jurisprudence, is closely connected with the husband's right of reduction into possession. Whenever the husband or his representative has to seek the aid of a court of equity in order to recover his wife's property, he must submit to its order of a suitable settlement from the fund. This settlement, which is made

tion into possession to collect the wife's *chose* and then intermingle the proceeds with his own property; or to have stock which was hers transferred to his own name, and then control it. *Bridgman v. Bridgman*, 138 Mass. 53; 143 Mass. 340.

<sup>1</sup> *Johnston v. Johnston*, 1 Grant (Penn.), 468; § 84.

<sup>2</sup> *Dunn v. Sargent*, 101 Mass. 386.

<sup>3</sup> Courts of equity, which have taken this subject under their especial control, seem to lay down variable rules; and it must be confessed that the law of reduction is so built upon exceptions that one may more readily determine what acts of the husband do not, than what acts do, bar the wife's survivorship. Another difficulty in dealing with this subject appears from the circumstance that personal property is rapidly growing, and species of the incorporeal sort are developed quite unknown to the old common law; while, on the other hand, the doctrine of the wife's separate estate, under the influence of equity and modern legislation, has expanded so fast as to furnish already new elements of consideration for most of the latest reduction cases, threatening to extinguish at no distant day all the old learning on the subject, even before its leading principles could be clearly shaped out in the courts. The doctrine of reduction into possession is set forth at length in *Schouler, Hus. & Wife*, §§ 154-159, with numerous cases cited. Various acts suffice, conclusive of the husband's intention. *Ib.* §§ 154-156. Reduction into possession by assignment affords many perplexing points. *Ib.* § 157. The husband's right to reduce is one of election. *Ib.* § 158. There may be reduction by suit. *Ib.* § 158. Doubtless the husband may elect not to reduce, so as to leave the property his wife's.

upon the wife for the separate benefit of herself and the children as a provision for their maintenance and comfort, is known as the wife's equity.<sup>1</sup> Thus chancery, by a stretch of power somewhat arbitrary, interferes to do an act of justice. The doctrine seems to rest upon two grounds: first, that whoever comes into equity must do equity; second, that chancery is the special champion of women and children.<sup>2</sup> The wife's right of equity to a settlement is something distinct from her right of survivorship; that is, her right upon her husband's death to property not reduced by him.<sup>3</sup> So, too, the wife's equity applies only to property which but for the settlement would become her husband's own; and such allowance should not be made out of property already her own separate estate.<sup>4</sup>

**95. Property held by the wife in a representative capacity at the time of marriage cannot vest in the husband; for here she has no beneficial interest which the law can transfer to**

<sup>1</sup> § 85; 2 Kent, Com. 139-143, and cases cited.

<sup>2</sup> § 85; Peachey, Mar. Settl. 158, 159. This jurisdiction appears to have been exercised from the earliest period. *Sturgis v. Champneys*, 5 M. & C. 103, per Lord Chancellor Cottenham. For the doctrine of the wife's equity to a settlement in detail, which gives rise to nice distinctions, see Schouler, *Hus. & Wife*, §§ 160-162; 33 Ch. D. 220. The husband's voluntary settlement from a fund will be sustained if equitable. 34 S. C. 401. Equity is not disposed to interfere after a reduction, to the exclusion of the husband's creditors. 25 Ky. Law Rep. 1640. The smallness of a fund is no bar to the settlement. The court exercises a liberal discretion in making an award to wife and children, even to the disadvantage of an insolvent husband's creditors. But the right to claim it is personal to the wife, may be barred or waived because of her acts or misconduct, and applies only to funds which have fallen into possession, or are not merely reversionary. Schouler, *Hus. & Wife*, §§ 161, 162. An adequate settlement on the wife may bar her equity. *Id.* § 162.

<sup>3</sup> *Norris v. Lantz*, 18 Md. 260; 4 Md. Ch. 283. See as to husband's assignment, *Osborne v. Edwards*, 3 Stockt. (N. J.) 73.

<sup>4</sup> § 85; *Alexander v. Alexander*, 85 Va. 353. The husband's assignee for valuable consideration takes subject to the wife's equity, although her survivorship may have been barred by the assignment. 14 B. Monr. (Ky.) 259; 2 Story, *Eq. Juris.* § 1412, and cases cited. See *McCaleb v. Crichfield*, 5 Heisk. (Tenn.) 288. But the wife's antenuptial debts must first be provided for. *Barnard v. Ford*, L. R. 4 Ch. 247.

her husband.<sup>1</sup> Any other rule would operate a fraud upon creditors and *cestuis que trust*. And a bailment to the wife is a trust in this sense.<sup>2</sup> But if the wife be executrix or administratrix at the time of her marriage, the husband is entitled to administer in her right, by way of partial offset to his legal liability for her frauds and injuries in such capacity.<sup>3</sup> A married woman cannot become executrix or administratrix without her husband's concurrence, — so long, at least, as he remains liable for her acts;<sup>4</sup> nor will payments made to her in such capacity without his assent be valid.<sup>5</sup> It is to be generally observed in cases of this kind that the right of disposition which the husband exercises is strictly the right of performing the trust vested in his wife, it being assumed that she cannot perform it consistently with her situation as a *feme covert*. His position is a fiduciary one, so that he cannot purchase from a coadministratrix without consent of all beneficiaries in interest.<sup>6</sup>

<sup>1</sup> § 86; 11 Mod. 178.

<sup>2</sup> *Fullam v. Rose*, 160 Penn. St. 47. Where a woman even after marriage becomes a bailee of money for safe keeping she cannot set up her coverture at the present day to bar the bailor. *Ib.*

<sup>3</sup> As incidental to this authority, he may release and compound debts, and dispose of the effects, and reduce outstanding trust property into possession as his wife might have done before coverture. § 86; 2 Bradf. Sur. (N. Y.) 153; 3 Ind. 268; 1 Iowa, 226; *Dardier v. Chapman*, L. R. 11 Ch. D. 442. And he may foreclose a mortgage with his co-executrix. 2 Col. T. 709. He is accountable for all property which came to her possession, whether actually received by him or not. *Scott v. Gamble*, 1 Stockt. (N. J.) 218. See *Lloyd v. Pughe*, L. R. 8 Ch. 88.

<sup>4</sup> Administration has been granted to a wife living apart from her husband under a deed of separation with apt provisions. 2 Curt. 640.

<sup>5</sup> § 86; 3 Curt. 50. As to the indorsement of a note payable to the wife as administratrix, see 18 N. H. 183. And see *Murphree v. Singleton*, 37 Ala. 412; *Airhart v. Murphy*, 32 Tex. 131; *Cassedy v. Jackson*, 45 Miss. 397. Statutes sometimes require the husband to join in the wife's bond as executrix, and otherwise vary the rule of the text. Wife made sole executrix with her husband's consent. *Stewart, Re*, 56 Me. 300. As to effect on chattels real where wife is executrix, see next chapter.

<sup>6</sup> § 86; 27 W. R. 410. An administrator cannot sue in his representative character upon contracts made after the death of the intestate merely in the course of carrying on the intestate's business or settling the

estate. Hence the husband must sue alone for goods supplied by husband and wife in carrying on the business of the wife's father, whose administratrix the wife was; and the joinder of the wife is improper. *Bolingbroke v. Kerr*, L. R. 1 Ex. 222. By marriage with a female guardian, too, the husband becomes responsible for the moneys with which she may then or afterwards during coverture be chargeable in such capacity, — the responsibility extending while she continues to act, whether it were proper for her so to continue or not. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174.

## CHAPTER VI.

### EFFECT OF COVERTURE UPON THE WIFE'S CHATTELS REAL AND REAL ESTATE.

96. Chattels real, such as leases and terms for years, have many of the incidents of personal property. But as between husband and wife they differ from personal chattels. The title acquired therein by the husband is of a somewhat anomalous nature; for upon them marriage operates an executory gift, as it were, the husband's title being imperfect unless he does some act to appropriate them before the wife's death. He may sell, assign, mortgage, or otherwise dispose of his wife's chattels real without her consent or concurrence;<sup>1</sup> excepting always such property as she may hold by way of settlement or otherwise as her separate estate.<sup>2</sup> Chattels real, unappropriated during coverture, vest in the wife absolutely, if she be the survivor; in all such respects resembling *choses in action*. But if the husband be the survivor, such chattels will belong to him *jure mariti*, and not as representing his wife; and in this respect they resemble *choses in possession*. As to the wife's chattels real, therefore, husband and wife are in possession during coverture by a kind of joint tenancy, with the right of survivorship each to the other; not, however, like joint tenants in general, but rather under the title of husband and wife; since husband and wife are, in contemplation of law, but one person, and incapable of holding

<sup>1</sup> Co. Litt. 46 c; 2 Kent, Com. 184; 1 Vern. 7. As to what are chattels real, see 1 Schouler, Pers. Prop. §§ 9, 20-44.

<sup>2</sup> § 87; 4 M. & C. 395; 2 Freem. 29. Marriage revokes the authority given by a woman to another than her husband to act as agent in leasing her lands. 46 Mo. App. 1.

either as joint tenants or tenants in common.<sup>1</sup> An exception to the husband's right by survivorship to his wife's chattels real occurs in case of joint tenancy. If a single woman be joint tenant with another, then marries and dies, the other joint tenant takes to the exclusion of her husband surviving her; for the husband's title is the newer and inferior one.<sup>2</sup>

<sup>1</sup> § 87; 2 Kent, Com. 135. The wife's chattels real may be taken on execution for the debts of the husband while coverture lasts, by which means the title becomes transferred by operation of law to the creditor, and the wife's right, even though she should survive her husband, is gone. 2 Kent, Com. 134; 1 P. Wms. 258. They may also be bequeathed by the husband by will executed during marriage, or by other instrument to take effect after his death, — with, however, this result: that if the wife dies first the bequest will be effectual, not having been subsequently revoked by the husband; while, if the husband dies first, the wife will take the chattel in her own right, unaffected by any mere will which he may have made, or by any mere charge he may have created. Co. Litt. 351 a, 466; 1 H. Bl. 535. It would appear that any assignment of a chattel real by the husband will completely appropriate it, even though made without consideration. 3 P. Wms. 200. But see note to 1 P. Wms. 380. And see as to *elegit*, 2 Bro. P. C. 10. Cf. 93 as to reduction into possession; 9 Ves. 98. As the husband is entitled to administer in his wife's right when she is executrix or administratrix, he may release or assign terms for years or other chattels real vested in her as such. Cro. Jac. 318; W. Bl. 801. But as to merger in such a case, see Co. Litt. 338 b; § 87.

<sup>2</sup> Co. Litt. 185 b. Where, during coverture, a lease for years is granted to the wife, adverse possession, which commences during coverture, may be treated as adverse either to the wife or to the husband. *Doe v. Wilkins*, 5 Nev. & M. 435. When the husband succeeds to his wife's chattel real upon surviving her, or appropriates it during coverture, he takes it subject to all the equities which would have attached against her. In other words, being not a purchaser for a valuable consideration, he can claim no greater interest than she had. Thus, where the wife's chattel interest is subject to the payment of an annuity, the husband must continue to make payment so long as the incumbrance lasts. And though he may not in all cases be bound on her covenant to make new leases, yet, if he does so, the equity of the annuitant will attach upon them successively. *Moody v. Matthews*, 7 Ves. 183; Amb. 719. On the question of contribution by annuitants, see 2 Ball & B. 204; 2 Ib. 553. Where the husband survives the wife, the common law vests the title to her chattels real in him so completely that he need not take out letters of administration on her estate to secure his right. *Bellamy, Re*, 25 Ch. D. 620. And see *Standard Paint Co. v. Mining Co.*, 133 Penn. St. 474.

97. Further, as to chattels real, the law enables the husband during coverture to defeat his wife's interest upon survivorship by an absolute alienation or disposition of the whole term, either with or without consideration.<sup>1</sup> And the same rule applies to the wife's trust terms as to her legal terms.<sup>2</sup> In order to make it effectual, the right of the party in whose favor the disposition is made must commence in interest during the life of the husband; but it is not necessary that it should commence in possession during that period.<sup>3</sup> The husband may by other acts than express alienation divest his wife's title, and defeat her rights by survivorship in her chattels real.<sup>4</sup> On the other hand, there are acts by the husband, which, although they amount to the exercise of an act of ownership, yet, as they do not pass the title, will not defeat the wife's right by survivorship.<sup>5</sup>

<sup>1</sup> § 88; Cro. Eliz. 287; 19 Wend. (N. Y.) 175.

<sup>2</sup> 2 Vern. 270 (incorrectly reported according to note); 1 Ch. Ca. 307; Prec. in Ch. 412.

<sup>3</sup> § 88. Thus the husband may grant an underlease for a term not to commence until after his death; and this act will divest the right of the wife under the original lease so far as the underlease is prejudicial to such right. Cro. Eliz. 287. Nor need his disposition cover the whole chattel, since the disposition necessarily operates *pro tanto*. Cro. Eliz. 33, 276; Riley v. Riley, 4 C. E. Green (N. J.), 229. Nor need it be absolute, since a conditional disposition is good if the condition subsequently takes effect. Co. Litt. 46 b. But see 4 Vin. Abr. 50, pl. 14. And the law enables the husband to dispose, not only of the wife's interest in possession, but also of her possibility or contingent interest in a term, unless where the contingency is of such a nature that it cannot happen during his life. Doe d. Shaw v. Steward, 1 Ad. & El. 300. And see 2 Russ. & My. 360. A distinction is, however, made between cases where the disposition is intended of the whole or of part of the property, and where it is intended as a collateral grant of something out of it. Co. Litt. 184 b.

<sup>4</sup> § 88. Thus, if the husband, holding a term in right of his wife, grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's term will thereby merge, and her right in it be defeated. 2 Roll. Abr. 495, pl. 50. See as to surrender of the lessor's term by feoffment, Cro. Eliz. 912. And see 18 Md. 334.

<sup>5</sup> § 88.

As to the husband's mortgage of his wife's chattels real — or, what is the same thing in equity, a covenant to mortgage — this is in reality a disposition as security, and until breach of condition the mortgagee has

98. Now, as to the effect of coverture on the wife's real estate. By marriage, the husband becomes entitled at common law to the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture. He is entitled to the rents and profits during coverture. His estate is therefore a freehold and a vested estate in possession. But it will depend upon the birth of a child alive during coverture, whether his estate shall last for a longer term than the joint lives of himself and wife, or not; that is to say, whether he acquires the right of curtesy initiate, to be consummated on the death of the wife leaving him surviving.<sup>1</sup> If there be no child born alive, his

no further title. But, in order to protect the mortgagee's rights, equity treats the mortgage or covenant as good against the wife to the extent of the money borrowed; that once paid, the chattels will continue hers. § 88; 2 Atk. 207. Concerning the wife's disability to mortgage, see 101 Penn. St. 239. After breach of condition, the mortgagee's estate becomes absolute; or, at least, he can make it so by foreclosure; and the alienation of the term being then completed at law, the wife's legal right by survivorship is defeated; subject, however, to the equity of redemption, where the husband has not otherwise disposed of that likewise. See *Pitt v. Pitt*, T. & R. 180; 1 Prest. on Estates, 345. So, too, transactions, not constituting mortgages in the ordinary sense of the term, may yet be so construed in equity where such was their substantial purport. For the effect of a proviso in the conveyance for redemption, pointing to a mode of reconveyance not in conformity with the original title, see 9 Jur. 679. And see *Betton's Trust Estates*, L. R. 12 Eq. 553; *Pigott v. Pigott*, L. R. 4 Eq. 549; 15 E. L. & Eq. 280.

Among the miscellaneous acts of the husband which will defeat the wife's survivorship to her chattels real at common law, are the following: A disseverance of his wife's joint tenancy during coverture. An award of the term to the husband, if carried into effect. The husband's criminal acts; such as attainder. So, too, his alienage. Waste operates as a forfeiture of a term. And finally, the husband's creditors may sell the wife's chattels real on execution, and by their own act determine her interest altogether. § 88 and old authorities cited. But the wife's survivorship is not defeated by such acts of her husband as erecting building on the leasehold premises; and making a mortgage sale, or lease of part bars the wife only so far. *Riley v. Riley*, 4 C. E. Green (N. J.), 229.

<sup>1</sup> See *post*, c. 15. In the event of such birth, his interest lasts for his own life, whether his wife dies before him or not.



interest lasts only so long as his wife lives. In either case, he has not an absolute interest, but only an estate for life, and his right is that of beneficial enjoyment for such period. When his estate has expired, the real estate vests absolutely in the wife or her heirs, and the husband's relatives have no further concern with it.<sup>1</sup> While, therefore, the husband has the beneficial enjoyment of his wife's freehold property during coverture, at the common law, the ownership remains in the wife. Herein her right becomes suspended, not extinguished, by her marriage, and the cover is upon her until the relation ends. The inheritance is in her and her heirs. For in what the common law most regarded as property — *i. e.* real estate — public policy was sedulous to keep it in the family line of each party, where a marriage brought no offspring to inherit.<sup>2</sup>

<sup>1</sup> § 89; 2 Kent, Com. 180; 1 Bac. Abr. 286; 9 Ind. 184; Clarke's Appeal, 79 Penn. St. 376; Rogers v. Brooks, 80 Ark. 612. The husband's rights and liabilities attach to property bought by himself and held in his name as trustee for his wife. Pharis v. Leachman, 20 Ala. 662. But not, as will be seen hereafter, to his wife's separate real estate.

While the general effect of our marital legislation may be to destroy this common-law freehold of the husband, a statute may exempt the wife's property from the husband's debts without destroying his marital estate. 128 Ill. 95; 170 Mo. 269.

<sup>2</sup> § 89. Consequently, the husband may collect and dispose of the rents. He may also sue in his own name alone for injury to the profits of his wife's real estate, as where growing crops are destroyed or carried off; for this relates to his usufructuary interest. Tallmadge v. Grannis, 20 Conn. 296 (intruding and digging up the soil). Or generally for forcibly entering the premises. Alexander v. Hard, 64 N. Y. 228; Gray v. Dryden, 79 Mo. 106. But for injuries to the inheritance, such as trespass, by cutting trees, burning fences, and pulling down houses, and generally in actions for waste, the wife must be joined; and if the husband dies before recovering damages, the right of action survives to the wife. So if the wife survives her husband, she may commence such suits without joining his personal representatives. 2 Kent, Com. 181; 2 Mod. 217; Bac. Abr. tit. Baron & Feme, K.; 1 Bl. Com. 362; Illinois, &c. R. R. Co. v. Grable, 46 Ill. 445; Thacher v. Phinney, 7 Allen (Mass.), 146. But the husband cannot prosecute such an action alone after his wife's death during the pendency of the suit. Buck v. Goodrich, 33 Conn. 37. During coverture the wife cannot sue alone with reference to her lands. 16 S. C. 220. Husband and wife are properly joined as plaintiffs

99. Besides the rents and profits during coverture, the husband, if the survivor, is entitled to all arrears accrued up to the time of his wife's death. Such property is not treated like the wife's *choses in action*, not reduced to possession. Accordingly he may maintain suit after coverture to recover all rents and profits which had accrued while coverture lasted.<sup>1</sup> In all cases, emblements or growing crops go to the husband or his representatives at the termination of his estate.<sup>2</sup> The husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him. But nothing more than the husband's usufruct is thereby affected; nor can the attachment or sale affect the

in a bill to protect and secure the permanent rights and interests to her real estate. *Wyatt v. Simpson*, 8 W. Va. 394.

It follows from our general statement that a husband has no right to grant a perpetual easement in his wife's lands. Such as a railroad right of way. *Gulf R. v. Donahoo*, 59 Tex. 128 (right of way for a railroad). But the husband as head of the family has control of the household and premises where they reside, though the wife be the owner. Upon this principle the husband is liable for injury to a third person by an animal kept on the premises. *Strouse v. Leipf* (1894), Ala. As to torts upon others in respect of the wife's land, see *Flesh v. Lindsay*, 115 Mo. 1; *ante*, 81.

<sup>1</sup> § 89. And where the wife joins her husband in a lease, the covenant for payment of rent is for the husband's benefit alone while the usufruct continues. § 89; 11 Barb. 572; *Matthews v. Copeland*, 79 N. C. 493. But it would appear to be otherwise where rent is reserved to husband and wife, and her heirs and assigns. 4 B. & C. 529. The wife need not usually be joined in such suits for rent. 10 Pick. (Mass.) 468; 2 Mod. 217; 17 Vt. 626; 4 Monr. (Ky.) 260.

<sup>2</sup> § 89; *Weems v. Bryan*, 21 Ala. 302; *Spencer v. Lewis*, 1 Houst. (Del.) 228. This rule was extended at the common law to cases of divorce *causa precontractus*. 5 Coke, 116 a. But it does not apply to divorce for the husband's misconduct under modern statutes. See 7 Paige (N. Y.), 65; *Jenney v. Gray*, 5 Ohio St. 45. The husband's lease in right of his wife operates so far in the tenant's favor as to entitle the latter to emblements; and this whether the husband be tenant by curtesy or not; no action, therefore, can be maintained by the wife in such cases. 2 Vern. 322; 1 Vt. 409. Where, pending an action of ejectment brought by husband and wife to recover possession of land to which they were entitled in right of the wife, the husband dies, the right to the rent current and in arrear, and also to damages for waste, survives to the wife; and as to

wife's ultimate title.<sup>1</sup> A husband's life estate may be barred by a statute of limitations like any other freehold interest.<sup>2</sup> The common law of attainder is of no force in this country so far as forfeiture and corruption of blood is concerned; but it probably applies to the husband's life interest in his wife's lands.<sup>3</sup> Where the husband was an alien he could not acquire an interest in his wife's real estate at the common law.<sup>4</sup> But that disability is now removed in great measure by statute.<sup>5</sup>

At common law, too, the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate.<sup>6</sup> Mere contingencies of the wife, which cannot happen before the death of either spouse, cannot be attached,

rents accruing after the wife dies also, these go to her heirs and devisees. *King v. Little*, 77 N. C. 138.

<sup>1</sup> 2 Kent, Com. 131; § 89; 1 Me. 6; 9 Vt. 326; 15 Barb. (N. Y.) 446; 5 N. H. 416; 12 Ohio, 79; 2 Stockt. (N. J.) 88; 12 Ind. 615; *Lucas v. Rick-erich*, 1 Lea (Tenn.), 726; *Sale v. Saunders*, 24 Miss. 24; *Cheek v. Waldrum*, 25 Ala. 152; *Schneider v. Starke*, 20 Mo. 269. But see 19 Wend. (N. Y.) 175. And see 35 Md. 344, as to the liability extending to the husband's interest as tenant by the curtesy; also 128 Ill. 95. For the Massachusetts rule, see 15 Pick. (Mass.) 23. For the effect of a deed of separation executed before judgment, see 17 S. & R. (Penn.) 361. But see *Bowyer's Appeal*, 21 Penn. St. 210. It is certain that the sheriff's deed cannot convey a greater interest than the defendant has at the time of attachment or of levy and sale. 14 Mass. 20; 2 McC. Ch. (S. C.) 119. Cf. *Starke v. Harrison*, 5 Rich. (S. C.) 7. Since the husband's life interest is liable for his own debts, it is liable for the debts of the wife *dum sola*. *Moore v. Richardson*, 37 Me. 438. And it is held that where a husband has conveyed his life estate in fraud of his creditors, they may levy upon the growing crops. *Stehman v. Huber*, 21 Penn. St. 260.

<sup>2</sup> *Kibbie v. Williams*, 58 Ill. 30.

<sup>3</sup> See Const. U. S. Art. III. § 3; also State constitutions. At the common law a husband's corruption of blood affected only his own real estate, including his life interest in that of the wife. § 89; 2 Bl. Com. 253.

<sup>4</sup> Washb. Real Prop. 48, and cases cited; *Bell, Hus. & Wife*, 151; Co. Litt. 31 b; *Menville's Case*, 13 Co. 293; 2 Bl. Com. 293; 2 Kent, Com. 39-75.

<sup>5</sup> § 89.

<sup>6</sup> *Baker v. Flournoy*, 53 Ala. 650.

therefore, by creditors of the husband; nor landed expectancies in general while continuing expectant.<sup>1</sup> He cannot adjust her boundaries alone.<sup>2</sup>

100. The husband alone has power to bind or alienate the wife's lands during coverture at common law. This right lasts, at any rate, during their joint lives (provided the parties be not in the mean time divorced); and if the husband gain a tenancy by curtesy, it lasts during his whole life. But the husband's power is commensurate with his estate. He cannot incumber the property beyond the period of his life interest, nor prevent his wife, if she survives him, or her heirs after his death, from enjoying the property free from all incumbrances which he may have created.<sup>3</sup> The universal doctrine, whatever may be the form of remedy, prevails at this day that the husband can do no act nor make any default to prejudice his wife's inheritance. And while his own alienation passes his life estate, it can do no more; but the wife, notwithstanding, may enter after his death and hold possession.<sup>4</sup>

101. So far as the effect of the husband's lease was concerned, the statute 32 Hen. VIII. c. 28 changed the old common law. By this statute, husband and wife are permitted to make a joint lease of the wife's real estate for a term not exceeding three lives or twenty-one years.<sup>5</sup> The husband's

<sup>1</sup> 2 Madd. Ch. 16; *Allen v. Scurry*, 1 Yerg. (Tenn.) 36; *Sale v. Saunders*, 24 Miss. 24; *Osborne v. Edwards*, 3 Stockt. (N. J.) 73; *Baker v. Flournoy*, 58 Ala. 650.

<sup>2</sup> 53 Conn. 496.

<sup>3</sup> 2 Kent, Com. 133. As to the abolition of fines and common recoveries, etc., by which this rule was once evaded, see § 90; 11 Q. B. 916; 1 Met. (Mass). 542; 4 Dana (Ky.), 284.

<sup>4</sup> § 90; 3 Ind. 203; *Huff v. Price*, 50 Mo. 228; *Jones v. Carter*, 73 N. C. 148.

<sup>5</sup> § 90. There were, however, some restrictions placed upon the operation of this statute. Thus, it was further declared that things which lie in grant, such as franchises, should be excepted; though tithes followed the general principle. And the old lease must have been surrendered either in writing or by operation of law within one year from making the new lease. Property in possession might be leased under

lease of the wife's lands, whether alone or jointly with her, may be good at the common law, though not made in compliance with the statute; for in such case the wife may affirm or disaffirm the lease at the expiration of coverture.<sup>1</sup> But the general principle is that a husband cannot, without his wife's consent, execute a lease of her real estate so as practically to interfere with the ultimate possession and enjoyment which the law accords to her.<sup>2</sup>

102. The husband's mortgage of his wife's real estate is effectual to the same extent as his absolute conveyance; that is to say, it will operate upon his full life estate or the joint life estate of himself and his wife, as the case may be, and no further. His lease of the wife's lands for a term of years, for the purpose of creating an incumbrance in the nature of

the statute, but not property in reversion. The lease would not exempt the tenant from responsibility for waste. And the rent reserved should not be less than the average rent of the preceding twenty years. This statute has been strictly construed both in common-law and equity courts of England. § 90; Cowp. 267. As to distraint for rent by the wife against a lessee, see 55 Md. 319.

<sup>1</sup> And the same right may be exercised by her issue, or by others claiming under her or in privity with her. So, too, where she marries again after her husband's death, her second husband has the privilege of election in her stead. But one who claims by paramount title to the wife, as, for instance, a joint tenant surviving her, cannot exercise this right. *Yelv. 78*; *Cro. Jac. 417*. See also *Toler v. Slater*, L. R. 3 Q. B. 42, where the lessee was held bound on his covenant to pay rent. As to ejectment of a tenant for breach of covenant under a joint lease, see 126 Penn. St. 470.

<sup>2</sup> § 90. Some acts of the wife, on being released from coverture, will amount to an affirmance of her husband's informal lease. Thus acceptance of rent from the tenant, after her husband's death, will confirm the lease. 7 T. R. 478. But parol leases of the wife's real estate are affected by the statute of frauds. See *Winstell v. Hehl*, 6 Bush (Ky.), 58. Whether acceptance of rent by the wife after the husband's death would confirm a lease in writing, made by the husband alone, is a question on which the authorities are not agreed. § 90; *Cro. Jac. 332*; *Bac. Abr. Leases*, C. 1. See 1 Cowp. 201; 2 Bing. 112. A distinction, however, is sometimes made between leases for life and leases for terms of years, when made by the husband alone. But according to the better authority both kinds of leases follow the same principle, and are not void but voidable at the husband's death. § 90 and authorities cited.

a mortgage, is treated in equity as a mortgage; and the wife's acceptance of rent after his death cannot make such a lease other than void on the termination of his life estate.<sup>1</sup> Nor should a husband acquire a tax-title to his wife's lands; for it is impolitic to allow him to antagonize her ultimate rights for his own advantage.<sup>2</sup>

103. The husband may dissent from a sale, gift, or devise of real estate to his wife during coverture; since otherwise he might be made a life tenant to his own disadvantage; but by such dissent he cannot and ought not to defeat her ultimate title as heir.<sup>3</sup> Nor on principle should he be permitted to dissent to any sale, gift, or devise to the wife's separate use, by the terms of which his own interest as life tenant is legally excluded. Subject to the husband's dissent and the wife's disagreement after her coverture ends, a conveyance to the wife in fee is always good;<sup>4</sup> and where a married woman has legal opportunity to disclaim and does not, she will be deemed to have elected to take.<sup>5</sup> If the real estate of the wife be converted into personalty during her life by a voluntary act of the parties, the proceeds become personal estate, and the husband may presumably reduce into his own possession or otherwise take the proceeds. This principle is known as conversion.<sup>6</sup> But where conversion takes place by act of

<sup>1</sup> § 91; 1 Cowp. 201; *Drybutter v. Bartholomews*, 2 P. Wms. 127. The husband's mortgage, in this country also, passes only his life estate, under the like circumstances. 3 Dana (Ky.), 291; 15 Wend. (N. Y.) 615; 9 Ind. 184; *Kay v. Whittaker*, 44 N. Y. 565; 17 R. I. 272. As to the wife's remedy for waste, see Schouler, *Hus. & Wife*, § 171.

<sup>2</sup> *Laton v. Balcom*, 64 N. H. 92.

<sup>3</sup> § 92; Co. Litt. 3 a. As to title given to the husband by mistake for the wife, see 27 Kan. 242.

<sup>4</sup> 2 Bl. Com. 292, 293; 2 Kent, Com. 150. The wife's privilege of disagreement to purchase extended to her heirs. *Id.*

<sup>5</sup> § 92. She cannot of course elect to take and then repudiate the recited terms of the conveyance to her. *Fort v. Allen*, 109 N. C. 183.

<sup>6</sup> § 92; *Hamlin v. Jones*, 20 Wis. 536; 4 Bush (Ky.), 37; *Tillman v. Tillman*, 50 Mo. 40; *Sabel v. Slingluff*, 52 Md. 132; *Humphries v. Harrison*, 30 Ark. 79. The wife ought, in case of a sale of her real estate, to require the proceeds to be kept apart and invested in her own name elsewhere, if she means to guard her right against the husband's legal appro-

law, independently of husband and wife, the rule is not so clear.<sup>1</sup>

104. In case of an agreement to convey the wife's lands, enforcement cannot be compelled against the wife; but it may nevertheless be binding upon the husband.<sup>2</sup> Where, however, the purchaser has not been misled, the husband cannot be made to convey his partial interest and submit to an abatement of the price, because of the wife's refusal to

priation of the fund. *Woodruff v. Bowles*, 104 N. C. 197. The husband agreeing to do this, the wife's right to the new fund is favored against his creditors. *Ib.*; 123 Ind. 126. And see c. 14.

<sup>1</sup> See 3 Barb. Ch. (N. Y.) 170, disapproving 1 Bro. C. C. 500. In New York it is held that where the real estate of a married woman has been converted into personalty by operation of law during her lifetime, it will be disposed of by a court of equity, after her death, in the same manner as if she had herself converted it into personal property previous to her death. *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 170. So, too, in some States, conversion of real estate, under partition proceedings, into personalty, has been held complete where equity decreed partition, and the wife died after a final confirmation of the sale in court, all terms of sale having been complied with, and all formalities duly observed. *Jones v. Plummer*, 20 Md. 416; *Cowden v. Pitts*, 2 Baxt. (Tenn.) 59. Where an administrator's sale of the wife's land is irregular, the husband cannot, apart from the wife, confirm it, even though he has received the purchase-money. *Kempe v. Pintard*, 32 Miss. 324. See also 5 Wis. 618; 3 Stockt. (N. J.) 73. But a husband may demand and reduce into possession his wife's legacy, even though it be made payable, by the terms of a will, from proceeds of the sale of the testator's real estate. 1 Md. Ch. 296. Conversion takes place where husband and wife convey to trustees to sell and dispose for payment of debts, balance to be paid them as they shall direct or appoint. *Siter v. McClanachan*, 2 Gratt. (Va.) 80. And see *post*, c. 14.

Where a married woman is entitled to a legacy, and land is given her in lieu thereof, the husband having effected no prior reduction of the legacy, it is to be held as hers and for her sole benefit. *Davis v. Davis*, 46 Penn. St. 342. But see *Davis's Appeal*, 60 Penn. St. 118. Land purchased by a married woman with the proceeds of a legacy which the husband has declined to reduce into possession is not liable for the husband's debts. *Coffin v. Morrill*, 2 Fost. (N. H.) 352. And see *Sims v. Spalding*, 2 Duv. (Ky.) 121. See further incidents, *Schouler, Hus. & Wife*, § 172.

<sup>2</sup> § 93; *Jordan v. Jones*, 2 Phill. 170; 6 E. L. & Eq. 124. And this even where the agreement was made by the wife before her marriage. Cf. old law of England which no longer holds good there. § 93.

convey her real estate which he and she had promised to convey.<sup>1</sup> A mere agreement by a *feme covert* for the sale of her real estate, the same not being her separate property, cannot be enforced at law or in equity against her, nor does her mere contract estop her from asserting title or justify a suit against her for specific performance.<sup>2</sup>

105. But modern statutes, which permit the wife to convey with the observance of certain formalities, often permit her generally to contract, to convey, and to incumber her lands. Under the modern statute of 3 & 4 Will. IV. c. 74, which took effect in England from the end of the year 1833, married women are permitted to alienate or incumber their real estate by conveyances executed with their husbands pursuant to its provisions. This important law, with its later modifications, unfettered property which had long been fast bound.<sup>3</sup> The statute requires the concurrence of the husband in such conveyances; also that the wife shall make an acknowledgment before certain judicial officers designated by the act, apart from her husband, to the effect that her own consent is freely and voluntarily given.<sup>4</sup> Specific performance, where the wife fails to execute in conformity with the statute, will not be enforced against her.<sup>5</sup> In this country the custom of a wife's joining her husband in a deed of conveyance of her lands has

<sup>1</sup> Tothill, 106; 8 P. Wms. 187; 7 Ves. 474; *Castle v. Wilkinson*, L. R. 5 Ch. 534.

<sup>2</sup> § 94; *Emery v. Ware*, 5 Ves. 846; Sug. V. & P. 11th ed. 230; *Parks v. Barrowman*, 83 Ind. 561. But see as to the effect of modern State legislation in this respect, 146 Penn. St. 444; *contra*, 101 Mo. 550. Specific performance may be decreed in a case of equitable separate estate. 104 Mo. 349; 53 Ark. 511. It is doubtful whether even a married woman, having a power of appointment, can thus bind herself. Sug. V. & P. 11th ed. 231. She certainly cannot in some American States. 11 Bush (Ky.), 241. But the wife cannot use her privilege in this respect unfairly, where the purchaser has become bound on his part. See *Cross v. Noble*, 67 Penn. St. 74; 5 Heisk. (Tenn.) 26. And see, for an exchange of land considered in equity, *Burns v. McGregor*, 90 N. C. 222.

<sup>3</sup> 8 & 9 Vict. c. 106.

<sup>4</sup> § 94; 18 C. B. n. s. 233; 23 Ch. D. 181. And see later act 45 & 46 Vict. c. 39 (1882) as to acknowledgment; 35 Ch. D. 345.

<sup>5</sup> *Cahill v. Cahill*, 8 App. Cas. 420.



prevailed from a very early period. In most, if not all, of our States, there are statutes existing as to the mode of execution, which contemplate the joinder of husband and wife in the conveyance, and an acknowledgment by one or both of the parties.<sup>1</sup> Thus, then, does the wife pass title to her real estate. And since, in the tenure of lands and the mode of conveyance, the law in this country has always varied considerably from that of England, the rights of married women in other respects may be different.<sup>2</sup>

<sup>1</sup> § 94 and local cases cited; 2 Kent, Com. 151-155, and notes, showing customs in different States. Some of the States require a separate acknowledgment of the wife apart from her husband, and even a privy examination by the magistrate, so as to make sure that she is acquainted with the contents of the deed, and acts freely and understandingly; but in this and other respects the laws are not uniform. Here there is less formality in general than under the English statute. Schouler, Hus. & Wife, § 174; 129 Ill. 680; Stimson's Am. Stat. Law, §§ 6500-6502.

<sup>2</sup> Thus it would seem that the joint assent of husband and wife in accepting a title should be as good as in granting one. 1 Washb. Real Prop. 280. And in New Hampshire it is held that a deed to a *feme covert*, made with her own and her husband's assent, vests the title legally in her. 2 N. H. 402. See *Leach v. Noyes*, 45 N. H. 364. In Pennsylvania, if land conveyed to her be incumbered, it passes to her subject to that incumbrance. *Cowton v. Wickersham*, 54 Penn. St. 302. And in Vermont it has been held that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from him is of no consequence. 6 Vt. 411.

The wife's executory agreement to convey real estate, whether expressed by bond or simple instrument, is in this country held void in the absence of enabling statutes, like her general contracts, though made with her husband's assent; and specific performance cannot be enforced against her. 2 Kent, Com. 168; 61 Penn. St. 382; 29 Ark. 650; 5 Heisk. (Tenn.) 26; 1 Halst. Ch. (N. J.) 415; 15 Me. 304; 83 Ind. 561. We make, of course, no reference here to the wife's separate property, or to her rights under what are known as the "married women's acts," to be considered *post*. A contract to convey, made by husband and wife, may be good against the husband, though void as to the wife. 19 Md. 5; 53 Wis. 572; 12 B. Monr. (Ky.) 326; 2 Kent, Com. 168. See *ante*, 62; *Moseby v. Partee*, 5 Heisk. 26. As to the wife's ratification of the husband's unauthorized contract for the sale of her land, see 27 Wis. 135.

The wife's defective conveyance of her land cannot be treated as her contract to convey it, nor as an estoppel. 79 Mo. 139; 62 Tex. 628; 80

106. The rights of the wife are nevertheless in all cases of statute conveyance, absolutely or for security, treated with

Mo. 179. So it has been held in various States that the wife cannot, either separately or jointly with her husband, execute a valid power of attorney to convey her lands. 10 Vt. 1; *Gillespie v. Worford*, 2 Cold. (Tenn.) 632; *Hardenburgh v. Lakin*, 47 N. Y. 109; 39 Ark. 120. But local statutes sometimes permit this. *Stimson*, § 6506. And a deed, in order to bind the wife's heirs, must have been delivered, as well as executed, during her lifetime. 34 Penn. St. 24; 102 Ill. 284. But see 7 Barb. (N. Y.) 386; 24 Ind. 231. Nor can her husband, after her decease, as against such heirs, confirm a conveyance which was fatally irregular on her part. 1 Fost. (N. H.) 470; 77 Mo. 452. If her conveyance be void, a note given in part payment of the price is necessarily without consideration. 14 Allen (Mass.), 163. She may recover the land defectively conveyed, and often without either repaying the purchase-money or compensating for the vendee's improvements. 85 N. C. 184. Repudiation of a sale allowed her, where the purchaser paid her husband less than she agreed to receive. 62 Tex. 108. Cf. *ante*, 104. As to the wife's agreement to purchase, &c., see 11 Bush (Ky.), 174; 49 Miss. 307; 106 U. S. 338; *post*, c. 9. Nor will the law coerce her into fulfilling her agreement by granting exemplary damages against her husband. 80 Penn. St. 413.

In some States the separate conveyance of a married woman, or her execution jointly with her husband, but without observance of the full statute formalities, is void. But in others such irregularities are not held fatal to the instrument, and she is furthermore bound on the usual principles, even though her deed be separate from that of her husband and executed at a different time. The question in such cases is mainly one of statute construction; and as to formalities, a distinction may be taken between mere errors of description, or literal informalities of execution or acknowledgment on the one hand, and, on the other, the disregard of some statutory requirement, so as to substantially violate public policy, such for instance, as her separate acknowledgment, or her declaration before the magistrate that she executed freely and understandingly for the purpose specified. See *Schouler, Hus. & Wife*, §§ 175, 176, where this subject of statute conveyances by husband and wife is considered at length. And see 175 Mo. 233. Under various of the more modern codes the wife may convey and acknowledge as *feme sole*, without the husband's joinder at all. See 36 Ark. 355; § 94; *Stimson*, Am. Stat. Law, §§ 6500-6502. In general, where the certificate of a married woman's acknowledgment of a deed states all that the local statute requires, although it be assumed to be only *prima facie* evidence of the facts stated in it, its statements cannot be successfully impeached by evidence not clear, complete, and satisfactory. *Young v. Duvall*, 109 U. S. 573; 67 Ala. 34; 67 Iowa, 63.

So, too, in this country a married woman may mortgage as well as

great consideration in our courts.<sup>1</sup> Wherever the wife joins her husband in a mortgage of her own property to secure his debts or the payment of money loaned to him, she is merely the surety of her husband, and is entitled to all the rights and privileges of a surety; this rule is well settled.<sup>2</sup> So, too, a wife is not bound by her warranty in a deed whether of absolute or mortgage conveyance which she executes. Nor by any covenants contained therein. This is the general common-law rule in England and America.<sup>3</sup> For this

alienate her real estate by joining her husband similarly in the conveyance and making due acknowledgment; and this, too, though no consideration pass to her thereby. § 94; 47 Me. 132; *Swan v. Wiswall*, 15 Pick. (Mass.) 126; 4 Conn. 44; 3 Johns. Ch. (N. Y.) 144; 2 Kent, Com. 167; *Siter v. McClanachan*, 2 Gratt. (Va.) 280; 15 Gray (Mass.), 491. But cf. § 152. Where the wife joins her husband in a conveyance in the nature of a mortgage, she subjects her real estate to the risk of complete alienation by foreclosure for her husband's debt, or by sale under a power of sale thereby conferred; and she is estopped by her own acts from denying the validity of the mortgage. 21 Penn. St. 436. She may covenant that *scire facias* may issue in default of payment. 24 Penn. St. 18. She may create a valid power in the mortgage to sell in default of payment. 2 Kent, Com. 167; 18 Barb. (N. Y.) 561; 74 Ill. 402. And in general she may convey upon condition and prescribe the terms. 3 Johns. Ch. (N. Y.) 129; 2 Kent, Com. 167; 1 Ves. Jr. 189 (English rule also). But independently of an express statute permission, and as our statutes generally run, the wife's mortgage without her husband's joinder or assent is void. *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; 61 Ill. 426; 26 Minn. 429; *Herdmann v. Pace*, 85 Ill. 345; 117 Ind. 9 (sole deed where husband was erroneously supposed dead). And so is her assignment of a mortgage. *Moore v. Cornell*, 68 Penn. St. 320. And where her joinder is literally only by way of releasing dower this defect vitiates the deed as against her. *Franklin Savings Bank v. Miller*, 17 R. I. 272. Equity will not reform defective deeds of this kind. 53 Ark. 53.

<sup>1</sup> § 95; *Bayler v. Commonwealth*, 40 Penn. St. 37, 44.

<sup>2</sup> 3 Paige (N. Y.), 614; 9 Paige, 200; 18 Barb. (N. Y.) 561. The property actually mortgaged by her, and not her property in general, is thus subjected to the payment of her husband's note; and she cannot be held personally liable for any deficiency under the foreclosure sale. *Strother v. Law*, 54 Ill. 413; *Logan v. Thrift*, 20 Ohio St. 62; *Schouler, Hus. & Wife*, § 177. Such restrictions are intended for her benefit, not for those of the mortgagee. *Bennett v. Mattingly*, 110 Ind. 197.

<sup>3</sup> § 95; 2 Kent, Com. 167, 168; 7 Mass. 21; 16 B. Monr. (Ky.) 637; 1 Zab. (N. J.) 525; *Botsford v. Wilson*, 75 Ill. 133; 53 Ark. 545.

accords with the principle that married women are incapable of binding themselves by contract: and the effect of her conveyance under the statute is simply that she passes whatever title she had in the lands conveyed. Yet the husband may be bound on his part, where he joins her, notwithstanding.<sup>1</sup>

107. The deed of an infant wife's real estate, executed by husband and wife while the latter is under age, may be avoided by the wife within reasonable time after discovery, though more than twenty years have elapsed;<sup>2</sup> for this is analogous to the conveyance of an infant *feme sole* in respect of validity.<sup>3</sup> As to the lapse of time permitted a wife for disaffirming the deed executed by her during in-

<sup>1</sup> 28 Ind. 464; 61 Ind. 362; *Bellows v. Litchfield*, 83 Iowa, 36. It was formerly said that the wife should be held bound on the covenants contained in a lease of her lands executed during coverture, with her husband, and affirmed by herself after his death, by such acts as the acceptance of rent; and this doctrine is certainly not unreasonable so far as a subsequent breach of covenant is concerned. 2 Saund. 80, note 9. But further than this, courts would not probably go at this day. *Foster v. Wilcox*, 10 R. I. 443 (her covenant for quiet enjoyment not binding). See further § 95. And in this country the wife's covenants in a conveyance executed jointly with her husband are considered binding upon her only by way of estoppel; and not so as to subject her to suit for damages. 10 Met. (Mass.) 192; 17 Johns. (N. Y.) 167; *Dean v. Shelly*, 57 Penn. St. 426; *Hyde v. Warren*, 46 Miss. 13. Her subsequent promise as widow to be answerable for a breach of covenant committed during her coverture is without consideration. *State Nat. Bank v. Robidoux*, 57 Mo. 446. And as she is not answerable for a breach of covenant, neither are her heirs or devisees. *Foster v. Wilcox*, 10 R. I. 443. See as to her acquiring subsequently an adverse interest, 17 Johns. (N. Y.) 167; 2 Barb. Ch. 314. A wife may relieve against the joint deed of herself and husband by showing, notwithstanding its recitals, that no consideration was paid. *Vincent v. Walker*, 93 Ala. 165. And see 62 Tex. 108. See further, § 95.

<sup>2</sup> 12 Mo. 549. And see *Porch v. Fries*, 3 C. E. Green (N. J.), 204; 4 Heisk. (Tenn.) 601; *Williams v. Baker*, 71 Penn. St. 476.

<sup>3</sup> § 96; *Dixon v. Merrett*, 21 Minn. 196. But not, as it is held, where the wife, being apparently of full age, made oath that she was of age. 7 Bush (Ky.), 298. *Sed qu.*, where the land belongs to the wife's general, and not her separate, estate. *Sims v. Everhardt*, 102 U. S. 800, commenting upon *Scranton v. Stewart*, 52 Ind. 68. It is inequitable to disaffirm and retain a consideration which can be restored. 88 Ky. 515; 92 Ky. 500.

fancy, the rule appears to be that a reasonable time should be allowed her after coverture has terminated by the death of her husband or their complete divorce, even though many years may meantime have elapsed since her attainment to majority.<sup>1</sup> But permissive acts on her part after she is both adult and discoverter may estop her within a reasonable time and amount to ratification.<sup>2</sup>

108. We should distinguish between a wife's general and her separate real estate. While modern statutes greatly vary in this country, as to the requisites attending a married woman's conveyance of her lands, and, as we shall notice hereafter, concerning her legal dominion over her lands, the disposition is to construe those requisites more strictly in the case of her general or common-law real estate than where she owns lands as her statutory separate estate. Hence a distinction, which modern legislation tends all the while to obliterate, between the conveyance of the wife's general land and of her separate land. As to the latter, estoppel *en pais* is sometimes applicable; but not so, usually, with the former. In the one case the wife's own conduct during coverture, by way of affirmance or receiving benefits, and more especially her fraudulent conduct, may bind her in spite of some defective method of conveyance; in the other and present case it does not.<sup>3</sup> As to the wife's separate real estate, the husband is frequently her managing agent, to collect rents and deal with the tenant on her behalf;<sup>4</sup> and some codes make him her trustee, with power to manage and control such real estate.<sup>5</sup>

109. If the wife at the time of her marriage has a life estate in lands, her husband becomes seised of such estate in the

<sup>1</sup> *Sims v. Everhardt*, 102 U. S. 300. And see 80 Ill. 197; *Fisher v. Payne*, 90 Ind. 183.

<sup>2</sup> *Logan v. Gardner*, 136 Penn. St. 538; 119 Ind. 188; Part V. c. 5, *post*.

<sup>3</sup> § 97; *Wood v. Terry*, 30 Ark. 385; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Sims v. Everhardt*, 102 U. S. 300; 106 U. S. 338; 108 Ind. 301.

<sup>4</sup> *Kingsman v. Kingsman*, 6 Q. B. D. 122; *Cahill v. Lee*, 55 Md. 319; *Buck v. Lee*, 36 Ark. 525.

<sup>5</sup> 81 Ala. 411. See cs. 10, 11, *post*.

right of his wife, and he is entitled to the profits during coverture. So if it were granted to a trustee for her own use. And the same rule applies whether the estate be for the life of the wife or of some other person. If the estate be for the wife's own life it terminates at her death, and the husband has no further interest in it. But if it be an estate for the life of another person who survives her, the husband takes the profits during the remainder of such person's life as a special occupant of the land.<sup>1</sup> A husband acquires, by his marriage, the right to use and occupy, during coverture, lands held by his wife in joint tenancy.<sup>2</sup>

110. The wife's devise cannot operate upon the freehold which the husband acquires in his own right in her real estate during her coverture, any more than can her conveyance, independently of his permission.<sup>3</sup>

<sup>1</sup> § 98. The husband's representatives in either case take crops growing on the land at the time of his death. 2 Kent, Com. 134. But the husband might, at common law, take a release or confirmation to enlarge his life estate. Co. Litt. 299. The conveyance of the wife's life estate follows the usual statute rule as to her conveyances. *Henning v. Harrison*, 13 Bush (Ky.), 723. See 1 Russ. 1; Schouler, Hus. & Wife, § 157.

<sup>2</sup> § 98; *Bishop v. Blair*, 36 Ala. 80; *Royston v. Royston*, 21 Ga. 161.

<sup>3</sup> § 98; *Clarke's Appeal*, 79 Penn. St. 376. See *post*, c. 15, as to the wills of married women.

## CHAPTER VII.

### COVERTURE MODIFIED BY EQUITY AND RECENT STATUTES.

111. A prevalent tendency to equalize the sexes affects at this day the rights of the marriage state. Aside from woman's political relations, and those social and business opportunities, not peculiar to marriage, which are now extended considerably to her sex, we may observe, both in England and the United States, a liberal disposition of court and legislature within the past fifty years to bring her nearer to the plane of manhood, and advance her condition from obedient wife to something like a co-equal marriage partner. Man makes the concessions, step by step, out of deference to woman's wishes, and in token of her influence; and thus does the coverture theory of marriage gradually fade out of our jurisprudence. The liberal tendencies of modern civilization favor this change: moreover, that love of justice and individual liberty which has characterized our Saxon race, and the steadfast disposition of English and American courts both to administer the written law impartially, and to extend and adapt its provisions to the ever-changing wants of society. Our preceding pages have shown, in respect to the person of the spouses, their matrimonial domicile, the conjugal restraint and correction of the wife, the custody of the offspring—again, as to the wife's power to bind as agent, her necessities, or, in respect of property, her equity to a settlement, and modern modes of conveying her lands—a modern disposition to so construe and apply or modify even the old law that she may enjoy a very fair share of freedom and consideration in the household, and maintain her dignity under all circumstances. Husband and wife cease to be one; they are two distinct persons with distinct and independent rights. At the same time the idea of unity in the domestic government

— of domestic government at all — becomes weakened; the cruel or dissolute husband having less power for ill, and the just and faithful one, too, finding his legal authority over a high-tempered companion exceedingly precarious. Modern legislation accomplishes even more than judicial construction towards this result, especially in the United States; and indeed, as to the married women's acts and divorce acts of this day, it may be truly said that England borrows more from this country than does this country from England.<sup>1</sup>

112. Of the American married women's acts which relate chiefly to their property and contracts, we have already spoken.<sup>2</sup> These acts are modern; still, they are constantly undergoing local change, and immense labor has been necessarily bestowed by local courts during the last half century or more in expounding them. We shall seek to place before the reader such legal results as may be thought to have passed into principles; as for the rest, it is a chaos of uninteresting rubbish, from which the practitioner selects only that which obtains in his own jurisdiction. All this legislation regarding the rights of married women should be harmonized and simplified as soon as practicable. This is not easy with so many independent States, each carving out its own career. And the difficulty is aggravated from the fact that the married women's acts were experimental advances and had no common origin; there was no model found to work from, English or American, and the results were necessarily discordant and variable.<sup>3</sup>

113. The modern changes to which we shall proceed to direct the reader's inquiry, under our main heading, must be studied as by way of supplement or supersedure to the coverture doctrines set forth in the chapters preceding. As before, these changes affect the wife's debts and contracts, her injuries and frauds, and her personal and real property. They are partly of equitable and partly of statutory origin. But, most of all, they impair the old doctrine which treated the husband as absolute or temporary owner, controller, and

<sup>1</sup> § 100.

<sup>2</sup> See Part I., *supra*.

<sup>3</sup> § 100.



manager of his wife's property and acquisitions, by virtue of the marriage, and create in favor of the wife what is commonly known in these days as her separate property.<sup>1</sup> Here, therefore, as on most points relating to the law of husband and wife, one must first examine the old common-law or coverture doctrine, and then perceive how far modern equity rules or the local legislation may have varied that law. Such changes date back not much farther than a century, the most radical of them being but about half a century old; the equitable changes being for the most part of earlier, and the statutory changes of later, date; and the law of England and this country harmonizing on the whole subject, at the independence of the American colonies, as at their first settlement. The instances will be found rare at the present day, where an important common-law principle respecting the wife's contracts, torts, property, and the formalities of suit is not found at this day essentially changed.<sup>2</sup>

114. **There is an equitable doctrine on this subject and a statutory doctrine.** The equitable doctrine is the prior in point of time, and is chiefly the work of English chancery courts; while the statutory doctrine, which is of later date, is founded in the married women's acts, now familiar in our several States, and their judicial construction. The equitable doctrine is more purely English; the statutory doctrine more purely American, — though each country has come, ere this day, to borrow in such respects from the other. American cases sometimes distinguish still between an equitable separate estate and a statutory separate estate in favor of a wife; but so sweeping is the latest legislation in most States that such a distinction becomes of comparatively little consequence. England, too, following the American example has by her latest legislation given the wife's separate property a strong statutory establishment, so as to supersede largely that of equity creation.<sup>3</sup>

<sup>1</sup> More gradually, perhaps, and yet surely in tendency, general rights as to the person of the spouse suffer great change in this later generation; and this largely by indirection. See c. 2, *supra*.

<sup>2</sup> § 101.

<sup>3</sup> § 102.

## CHAPTER VIII

### THE WIFE'S SEPARATE PROPERTY; ENGLISH DOCTRINE.

115. Here, and with reference to Great Britain, our concern is almost exclusively with the remarkable development of an equitable doctrine of separate property. Emerging from coverture and the common law, we come out into the light of equity; and here all things assume a new aspect. The married woman is no longer buried under legal fictions. She ceases to hold the strange position of a being without an existence, one whose identity is suspended or sunk in the status of her husband; she becomes a distinct person, with her own property rights and liabilities. Her condition is not as independent as before marriage; this the very idea of the marriage relation and the disabilities of her sex forbid. But she is dependent only so far as the laws of nature and the forms of society make her so; while her comparative feebleness renders her the special object of chancery protection whenever the interests of herself and her husband clash together. She may contract on her own behalf; she may sue and be sued in her own name; she may hold lands, goods, and chattels in her own right, which property is known as the wife's separate estate, or estate limited to the wife's separate use; and procedure is chiefly *in rem*.<sup>1</sup> This great change in the jurispru-

<sup>1</sup> § 103. The doctrine of the wife's separate estate originated in the spreading conviction that it was expedient for the interests of society that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property without that property being subject to the control of the husband. *Rennie v. Ritchie*, 12 Cl. & Fin. 234. In England that doctrine was established more than a century ago, and to the equity courts belongs the credit of the invention. 1 P. Wms. 124; *Tullett v. Arm*-

dence of England was effected by a few great men without any help from the legislature. The court of chancery in this as in other respects recognized its true function of making the law work justice by accommodating its operation to the altered circumstances of society.<sup>1</sup>

116. No express appointment of a trustee is necessary. Where property comes to the wife's separate use, it is treated in equity as trust estate, of which she is *cestui que trust*; yet it is not actually necessary that the instrument constituting the separate use should itself make an appointment of trustees. Formerly the rule was otherwise; but at the present day equity makes the husband a trustee where no other holds possession, and thus supports the trust.<sup>2</sup> It impresses a trust upon the wife's separate estate wherever such estate may be found. But while the appointment of third persons as trustees is not essential to give the wife a separate estate, or a separate interest in any particular estate, it is certainly desirable on many accounts; and there is in it this marked advantage, that the property is made thereby more secure,

strong, 1 Beav. 21. The equity to a settlement, of which we have already spoken, is part of that doctrine. *Supra*, 94. While at common law the separate existence of the wife was neither known nor contemplated, equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the courts gradually widened and developed this principle until it became fully settled that, however the wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate, no matter though the husband himself must be held as the trustee to support it. *Tullet v. Armstrong*, 1 Beav. 21; § 103.

<sup>1</sup> § 103. Obscure and doubtful indications of the wife's separate estate are found as early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time it was perfectly established; and Lord Thurlow, in sanctioning the clause against anticipation, prevented the wife herself from destroying the fabric which had been reared for her benefit. 4 Bro. C. C. 485; *Tullett v. Armstrong*, per Lord Langdale, 1 Beav. 22.

<sup>2</sup> § 104; 2 P. Wms. 316; *Peachey*, Mar. Settl. 260; *Fox v. Hawks*, L. R. 13 Ch. D. 822. And see 9 Ves. 375 (trustee paying to husband in breach of trust).

because such influence of the husband over the wife is prevented as might induce her to abandon the property to him.<sup>1</sup>

117. **Coverture applies prima facie** to property which is in the wife at the time of marriage, or comes to her afterwards, and the husband's right takes effect accordingly. It is necessary therefore that the intention to establish a separate use be clearly manifested, else courts of equity will not interpose against him. No technical formalities or expressions are required; but the purpose must appear beyond the reach of reasonable controversy, in order to entitle the wife to claim the property as her own in derogation of the common law.<sup>2</sup>

<sup>1</sup> § 104; 4 M. & Cr. 408. And see L. R. 9 Eq. 58.

<sup>2</sup> As to the words which in themselves indicate the intention of creating a separate use, there have been numerous decisions. Among them the following expressions are held sufficient: "For her full and sole use and benefit." "For her own sole use and benefit." "For her sole use." "For her sole and separate use and benefit." "For her sole and separate use." "For her sole use and benefit." "For her own sole use, benefit, and disposition." "For her sole and absolute use." "For her sole use and disposal." "For her own use, and at her own disposal." "To be at her disposal, and to do therewith as she shall think fit." "Solely and entirely for her own use and benefit." "For her own use, independent of any husband." "Not subjected to the control of her husband." "For her own use and benefit, independent of any other person." "For her livelihood." "As her separate estate." "To receive the rents while she lives, whether married or single." § 105 and cases cited.

So, too, the intention of excluding the husband's marital rights may be inferred from the nature of the provisions attached to the gift; as where, for example, the direction is that the property shall be at the wife's disposal, or there is some other clear indication that such was the donor's intention. § 105 and cases cited. Yet, on the other hand, the form of expression will go far towards determining whether property is or is not limited to the wife's separate use. It is to be observed, then, that courts of equity will not deprive the husband of his rights at law unless the words of themselves clearly import the intention to exclude him. § 105 and cases cited. Some controversy has arisen over the peculiarly strong effect of such words as "enjoy," "own," "proper," "sole," etc.; but, as in testamentary construction, the general and fair sense of an instrument should prevail. § 105 and cases cited.

As a wife is only made a party to a suit instituted by her husband on the alleged ground of her having separate estate, in regard to which she is a *feme sole*, the husband, by making her a party, admits it to be her separate estate. *Earl v. Ferris*, 19 Beav. 69.

118. A gift of the produce of a fund is to be considered a gift of that produce in perpetuity; hence it is a gift of the fund itself, nothing appearing to show a different intention. Therefore a bequest of a fund to a woman, with the interest thereon, to be vested in trustees, — the income arising therefrom to be for her separate use and benefit, — vests the capital for her separate use.<sup>1</sup> It is fair to suppose that in equity the wife's separate use binds the produce of the fund as well as the fund itself.<sup>2</sup> What the wife saves out of her separate income, too, if its identity be properly preserved, is in equity her separate estate.<sup>3</sup> It must only be observed that income or produce of the fund, if once in the husband's hands, may readily be presumed to have been bestowed upon him by the wife, either for himself or the family expenses.

119. The quality of separate estate ceases on the death of the wife; and if her husband survives her, he becomes entitled to the property as though it had never been settled to her separate use. For the separate use is created only for the marriage state, and is not designed to extend beyond the dissolution of marriage, or when the necessity of the trust should be no longer felt.<sup>4</sup> Since, therefore, the separate use can exist only in the marriage state, it may sometimes have an ambulatory operation, so as to be effectual according as the woman happens at the time to be covert or sole.<sup>5</sup>

<sup>1</sup> § 106; 19 Ves. 416; *Troutbeck v. Boughy*, L. R. 2 Eq. 534.

<sup>2</sup> See common-law doctrine compared. 7 M. & W. 183; § 106.

<sup>3</sup> *Barrack v. M'Culloch*, 8 Kay & J. 110; 4 Jur. N. s. 472.

<sup>4</sup> 10 Sim. 254 (choses in possession); 2 Myl. & K. 57 (choses in action); *Stead v. Clay*, 1 Sim. 294; § 107. Separate property becomes at wife's death like any other property of hers, and husband takes curtesy, etc. *Cooper v. Macdonald*, L. R. 7 Ch. D. 288.

Yet the wife may defeat her husband's claim after her death by exercising her power of disposition during her lifetime, — a power which is recognized in a married woman so far as her separate property is concerned. See *post*, 122. So, too, by the terms of the trust, the husband's rights on her decease may be prevented from attaching. 15 Sim. 308; *Moore v. Webster*, L. R. 3 Eq. 267 (curtesy).

<sup>5</sup> As where the wife is single when the gift takes effect and afterwards marries; or if again she survives the marriage; or if, once more, she

120. A single woman may renounce separate use upon her marriage where a gift was expressed to be to her separate use. Yet the courts construe an act of this sort strictly and require clear evidence of intent.<sup>1</sup> Antenuptial settlements may be made on reasonable terms by the parties contemplating marriage. And there is nothing to prevent the operation of a trust for separate use from being confined to a particular coverture, where all concerned are so minded. In such cases, however, the wife marrying again can always stipulate for her separate use.<sup>2</sup>

121. Apparently the marital obligations of the husband are not essentially altered by the wife's right to separate property.<sup>3</sup> The common-law liabilities of the husband, to be sure, rest in great measure upon his right to his wife's property; yet it would be difficult to adjust any new rule except upon partnership principles. If one marries a rich wife, therefore, who chooses to hoard her savings by herself, bequeath all to others, and compel him, a poor man, to pay for everything she or the children need, all their lives, he assuming her antenuptial debts besides, it is possible that even equity will deny him relief. We here suppose that neither legislation nor the wife's own disposition of her separate property affects the question.<sup>4</sup>

122. The clause of restraint upon anticipation is an important element in the doctrine of the wife's separate use, as administered in England. This clause was sanctioned by Lord

remarries. *Tullett v. Armstrong*, 1 Beav. 1; 2 Myl. & K. 427; affirmed 4 Myl. & Cr. 377; *Hawkes v. Hubback*, L. R. 11 Eq. 5.

<sup>1</sup> § 108; 1 Keen, 648.

<sup>2</sup> § 108; 8 Sim. 149. But as to *bona fide* third parties for value, see 9 Ves. 583.

<sup>3</sup> § 109; 5 Ves. 520 (wife not bound to support husband or family). But cf. *cs.* 9-12, *post*; *Baker's Trusts*, L. R. 13 Eq. 168.

<sup>4</sup> § 109. Moreover, the wife is not bound to maintain, educate or provide for her children out of her separate property; and even though she elope from her husband, equity will not lay hold of her estate for that purpose. *Hodgden v. Hodgden*, 4 Cl. & Fin. 323, reversing the decree below. But see legislation in England, *post*, and cf. as to wife's equity, *ante*, 94.

Thurlow;<sup>1</sup> is frequently to be met with in modern conveyances; and is pronounced by eminent English jurists, a salutary clause which takes from the wife the power of bringing ruin upon herself.<sup>2</sup> Like the separate use itself, this clause of restraint on anticipation exists only in the marriage state; it does not prevent or interfere with the receipt of regular income; and property vested in a single woman she may dispose of absolutely, despite such limitation, so long as she remains unmarried; but upon her coverture, while retaining such property, the separate use and the restraint upon anticipation attach and become effective together, cease together upon her widowhood, and revive together upon her remarriage.<sup>3</sup>

123. Under recent English statutes important changes are made with the view of creating a statutory separate estate in married women.<sup>4</sup>

<sup>1</sup> See 3 Bro. C. C. 340, n.; doctrine afterwards affirmed in 2 Mer. 487 by Lord Eldon.

<sup>2</sup> See § 110; Macq. Hus. & Wife, 312. For incidents of this clause (which need not use the word "anticipation" or any special form of expression), see § 110 and cases cited; its application is a broad one, but late English legislation affects it. See 11 Q. B. D. 27; 14 Q. B. D. 973; 82 Ch. D. 361; (1891) 2 Q. B. 422; (1894) 3 Ch. 135; *Stogdon v. Lee*, 1 Q. B. 661 (1891).

<sup>3</sup> § 110; 1 Beav. 1. See *Izod v. Lamb*, 1 Cr. & J. 35; *Daivson v. Atkinson*, 5 T. R. 434; *Dean v. Brown*, 2 Car. & P. 62; Macq. Hus. & Wife, 291.

<sup>4</sup> See Act 33 & 34 Vict. c. 93 (1870); L. R. 8 Q. B. 299. This moderate act was doubtless the result of influences such as were first manifested in the United States, for the American legislation on this subject long antedates the English. Legislation, still later, repeals this act and makes a new and more comprehensive property act of 1892, which still more closely resembles an American statute in favor of the wife's independent capacity. § 111 recites details. Nor is this the last of such marital legislation. *Ib.*; Act of 1893. See 45 Ch. D. 51.

Common-law courts sometimes recognized and protected the wife's separate property, but not unless a trustee was interposed to hold the legal estate as legal owner. 2 Car. & P. 62; § 111.

## CHAPTER IX.

### THE WIFE'S SEPARATE PROPERTY; AMERICAN DOCTRINE.

124. In this country the doctrine of the wife's separate estate is one of peculiar growth and development, though doubtless originating in the maxims of the English chancery, and deriving much of its strength from the splendid accomplishments of Langdale, Thurlow, and Eldon, in their own land. What such men and their successors effected by judicial policy, we have carried into our statutes; and we have gone much further. In England the equitable rights of married women are chiefly the triumph of the bench; with us the early efforts of the bench have been eclipsed by the later achievements of the legislature, and the judge follows the lawgiver to restrain rather than enlarge. There, in historical sequence, it was proper to study first the equitable doctrine of separate property; here the statutory doctrine may well take precedence.<sup>1</sup>

<sup>1</sup> § 112. When this country was first settled, the separate use was but little understood in England. Its development there was gradual, and its final establishment of a later date. Our ancestors brought over the common law with them; but for equity they had little respect. True, it cannot be said that, by the jurisprudence of a single State, property bestowed upon a married woman to her separate use, free from the control and interference of her husband, would remain subject, notwithstanding, to his marital dominion; but prior to the late married women's acts there were, in many States, no judicial precedents to combat such an assumption. That such trusts might be created was not denied; but whether there were courts with authority to enforce them appeared frequently doubtful. § 112. Cf. 2 Kent, Com. 162; Reeve, Dom. Rel. 162; 2 Story, Eq. Juris. § 1378 *et seq.* We confine our observation to judicial precedents. In the New England States scarcely a vestige of the separate use was to be found. *Jones v. Ætna Ins. Co.*, 14 Conn. 501, intimated that the married woman could not, in Connecticut, be the independent owner of property. But see *Pinney v. Fellows*, 15 Vt. 525 (1843). New York, with such eminent chancellors as Kent and Wal-



125. During the twenty-five years preceding 1848, a change in public opinion had been gradually wrought in this country and in England, though with us more rapidly than abroad. The married woman of America turned to the legislature rather than the courts of her State for a more complete marital independence, for the right to control her own property, for freedom from the burdens of coverture. In shaping popular sentiment, doubtless, the annexation of territory lately governed by the principles of Roman law had considerable influence, particularly in the States adjacent to Louisiana; still more in a national sense did our rapid advancement as a self-governed nation, and the spread of public education, of worth, took the lead in building up an equity system parallel with that of England; and in the reports of this State are to be found most of the leading cases and the ablest discussions of what may be termed American chancery doctrines. New Jersey recognized the separate use, and her chancery court exercised liberal powers. In Pennsylvania the doctrine was recognized to some extent. The courts of Maryland, Virginia, and the Southern States generally, had frequent occasion to apply the separate-use doctrine: none more so than those of North and South Carolina. And it may be remarked that the aristocratic element of society in that section of the country, also a prevalent disposition for family entails, marriage settlements, and fetters upon the transmission of landed property, aided much in developing therein the English chancery system. So was it in Kentucky and Tennessee, States founded upon like institutions. But as to Ohio, Indiana, Illinois, and the other States erected from what was formerly known as the Northwest Territory, society was modelled more after New England, and we find no clear recognition of the wife's equitable separate use. Louisiana, and such contiguous States as were originally governed by French and Spanish laws had more or less of the civil or community system; and to these States English equity maxims had at best only a limited application. Such, then, is the wife's separate use, viewed in the light of judicial precedents, as known in the United States until very nearly the middle of the nineteenth century. § 112 and cases cited; 3 Johns. Ch. (N. Y.) 65; U. S. Eq. Dig. Hus. & Wife, 12. But where recognized and enforced at all, the strict American rule was borrowed from that of England; and such, too, has been the later development, see *post*, 137. Our American equity courts followed the English precedents pretty closely, but without displaying the same vigor and boldness. None of our reported decisions on the subject of the wife's equitable separate property attracted popular attention or served to bring out the discussion of strong leading principles, though covering a period of sixty years down nearly to the middle of the nineteenth century.

independence in life and manners, and of equal social intercourse of the sexes, help on the new reform. The year 1848 saw a wondrous revolution effected in the foremost States of this Union as to the property rights of married women; and this revolution has since extended to every section of the country. The influence of these changes has also been felt abroad; and a like reform was pressed in the English Parliament about 1870, whose immediate result was the first of the statutes to which we have already alluded.<sup>1</sup>

126. The main principles touching the acquisition of a statutory separate property by the wife, as an American system of positive law, we shall now briefly consider as fairly as the circumstances permit. And, first, it may be remarked in general that these American married women's acts are designed for woman's benefit, and that they do not limit, but rather extend, her former right to hold separate property beneficially.<sup>2</sup> Where she is held to be restricted by the statute at all, it is generally with reference to the right of disposition, and in order that others may not subject it to the fulfilment of her engagements injuriously to her own interest.<sup>3</sup> Moreover the doctrines of an equitable separate estate in the wife are generally invoked at this day as furnishing a system avail-

<sup>1</sup> *Ante*, 123. See § 113 at length for a *résumé* of the marital legislation in this country prior to 1848. The better independence of deserted wives became the first object of attention as early as 1821. But the sweeping "married women's acts" of New York and Pennsylvania, as a parallel legislation in 1848, marks strongly the beginning of our new social revolution as to the wife's separate statutory property. § 113. From this time forth the revolution became rapid, and has since extended to all the States, Virginia being the last (1877) among the older ones to yield. And the work of legislative change still goes on. Scarcely a year passed between 1850 and 1870 without some new married women's acts added to the local statute-books. § 113 and authorities cited; Schouler, *Hus. & Wife*, Appendix (1882). And see 36 Conn. 10. Numerous other modified acts have since been embodied in the codes. See Stimson, *Am. Stat. Law*, §§ 6420-6422 (1886). With regard to woman in general, the constant tendency has been to enlarge her freedom of action, and open to her sex pursuits hitherto closed against it. § 113.

<sup>2</sup> 26 Ala. 292; *Gillespie v. Beecher*, 94 Mich. 374.

<sup>3</sup> See 7 S. & M. (Miss.) 64; 12 Minn. 430; 74 N. C. 437; c. 11, *post*.

able for her advantage, wherever (as rarely happens) the statutory privileges, in any particular instance, prove less adequate for establishing her independent property relations; the main policy of the married women's acts being, not to supersede the wife's equitable rights, but to enlarge her legal status, and correct the old anomaly which left her a person in equity but none in law.<sup>1</sup>

127. The will of the legislature in such enactments should be fairly interpreted and with liberal and not technical intent. The legislative will is not presumed to be so exerted as to operate retrospectively. "A retrospective statute, affecting and changing vested rights," observes Chancellor Kent, "is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."<sup>2</sup> The whole current of American decisions confirms that statement; and thus is it with our married women's acts, for they necessarily reduce the property rights of the husband as prevalent under the common law of coverture. The respective rights of a husband and wife, duly married, in property acquired in any State, before fundamental law or appropriate legislation therein has changed the old rule, must accordingly be governed by the rules previously in force.<sup>3</sup> A corresponding rule of constitutional limitations

<sup>1</sup> § 114; 82 Me. 260 (infancy disability).

<sup>2</sup> 1 Kent, Com. 455. Various national and State constitutional provisions have a similar bearing. An act which authorizes married women to contract and be contracted with in the same manner as if unmarried is constitutional. 15 S. C. 581. See further, 145 U. S. 487. A State may by fundamental law or statute provide that after-acquired property of a married woman shall constitute her separate estate, not liable for the husband's debts nor subject to his control. But neither State statute nor State constitution can take away from the husband any property rights already vested in him. *Allen v. Hanks*, 136 U. S. 300. Cf. 92 Ala. 176.

<sup>3</sup> "Married women's acts" is a title misleading, for they correspondingly concern married men; "marital acts" is a better expression. See § 114 and cases cited; 11 S. C. 71 (husband's vested interest taken on execution); 49 Ill. 49 (rights under a foreign government); *Almond v. Bonnell*, 76 Ill. 536; *Stilphen v. Stilphen*, 65 N. H. 126; 64 Ill. 238 (increase of domestic animals previously purchased); *Buchanan v. Lee*, 69 Ind. 117 (choses in possession); *Dunn v. Sargent*, 101 Mass. 339

applies to the rights and liabilities of the wife under these acts, as to her title by gift or purchase, and as to her

(chooses in action may be reduced); 12 N. Y. 202; *Ryder v. Hulse*, 24 N. Y. 372; 30 Ala. 712; *Kirksey v. Friend*, 48 Ala. 276; 13 N. Y. 273, 288 (legacy or distributive share); 57 Ga. 412. But see, *contra*, *Keagy v. Trout*, 85 Va. 390; 53 Fed. (U. S.) 872. Cf. as to giving back to the wife, &c., after reducing, 119 Mo. 615; 29 Neb. 243; c. 14, *post*. As to an interest contingent, and yet more than an expectancy, see 101 Mass. 336; 3 Gray (Mass.), 398.

The husband's vested life estate by way of curtesy initiate in his wife's lands cannot be taken away by legislative enactment, any more than the wife's inchoate right of dower in her husband's lands. 38 Ill. 247; *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *McNeer v. McNeer*, 142 Ill. 388; 144 Ill. 274. Cf. *Allen v. Hanks*, 136 U. S. 300, where the precise point is not considered. *Contra*, 85 Va. 390. And see as to accruing rents, 79 N. C. 493. Nor can any interest which a husband, before the passage of the act, has in his wife's real estate be thus divested. *Burson's Appeal*, 22 Penn. St. 164; 31 N. J. L. 244. See 87 N. C. 329; 17 S. C. 313; 12 Lea (Tenn.), 490. On the other hand, where the husband's liability for his wife's antenuptial debts was fixed by marriage, a statute removing that liability is not presumed to be retroactive. *Taylor v. Rountree*, 15 Lea (Tenn.), 725; *Desnoyer v. Jordan*, 27 Minn. 295.

In some States all these constitutional perplexities are obviated by legislation which embraces simply such property as may be held or acquired by women marrying after the passage of the act. Cf. 25 Cal. 367; 6 Oreg. 231. But the married women's acts or constitutional amendments usually operate upon parties occupying already the conjugal relation, as the statute language shows, and upon those consequently who as a fact are likely each to have married with some reference to the pecuniary expectations of the other. The marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possesses at the time of the marriage, but rather that she shall have whatever interest the legislature, before she is invested with them, may think proper to prescribe. 18 Barb. (N. Y.) 159; 36 Me. 64. In other words, while the husband's vested rights arising under a marriage cannot be constitutionally disturbed by an alteration of the law, his mere expectancy, or the possibility of some future acquisition by right of marriage, is subject to any change which the legislature may choose to make prior to the vesting of a right in the husband. § 114; 79 N. C. 315; 101 Mass. 336; *Hill v. Chambers*, 30 Mich. 422; *Niles v. Hall*, 64 Vt. 453 (future crops); *Fairchild v. Knight*, 18 Fla. 770. And whatever a married woman may have acquired subsequently to the passage of an appropriate act by gift, devise, bequest, and so on, becomes her statutory separate estate, and all parties concerned must govern themselves accordingly. *Cherokee Lodge v. White*, 63 Ga.

dominion over her property generally, of which we are to speak hereafter.<sup>1</sup>

128. Our married women's codes fairly correspond in permitting the wife (subject to constitutional limitations) to hold, in her sole and separate right, all the property, real or personal, which she had at the time of marriage, or has acquired thereafter from any person other than her husband, by gift, grant, devise, or bequest. Real estate thus held or acquired is regarded, not as land of which the husband enjoys the beneficial use, but as her separate land. Leasehold property may be thus held and enjoyed by the wife.<sup>2</sup> Her personal property, whether in possession or lying in action, is her own, provided the statute description be fulfilled.<sup>3</sup>

129. Property acquired by exchange for the wife's statutory property is presumably her separate property likewise, as where one horse is exchanged for another.<sup>4</sup> And since the income of her separate fund is hers, property purchased with her savings from interest arising out of her separate funds belongs to her as her separate property like purchase

742; *Nevius v. Gourley*, 95 Ill. 206. But the wife's death intestate or without depriving the husband of his common-law rights in her personalty by any will which the law sanctions on her part, leaves his inheritance right as survivor unimpaired, so far as no express trust to her separate use may have excluded him. § 114. See 18 Fla. 770 (conditional liability); *Kenyon v. Saunders*, 18 R. I. 590.

<sup>1</sup> *Bryant v. Merrill*, 55 Me. 515; *Clark v. Clark*, 20 Ohio St. 128; *Lee v. Lanahan*, 58 Me. 478. Where a later act limits the wife's former power to encumber her separate property, it will not be taken as repealing the former power beyond what is inconsistent with the new provision. *Fraser v. Clifford*, 94 Ind. 482. But as to a later act enlarging the rights and legal capacities of the married woman, and repealing by implication former reservations in her favor, see 104 Ill. 537. A State constitution may conflict with the local statute and modify the right. 38 S. C. 121.

<sup>2</sup> 36 N. Y. 639; *Prevot v. Lawrence*, 51 N. Y. 219. As to land damages and equity to land, see *State v. Hulick*, 33 N. J. 307; 1 Grant (Penn.), 257; *Prout v. Hoge*, 57 Ala. 28.

<sup>3</sup> § 115; *Mason v. Fuller*, 36 Conn. 160 (stock transferred to married name); *Selden v. Bank*, 69 Penn. St. 424 (notes, bonds, etc.); *Gans v. Williams*, 62 Ala. 41 (animals); *Mitchell v. Mitchell*, 35 Miss. 114.

<sup>4</sup> § 116; *Pike v. Baker*, 53 Ill. 163.

from the principal.<sup>1</sup> In short, all the product and increase of the original property will become the wife's as long as she can follow and identify it,<sup>2</sup> though expenditure of income for authorized family purposes may well be presumed.<sup>3</sup> Such questions of the wife's title are questions of fact.<sup>4</sup>

130. **Methods of transfer from third parties** are sometimes considered under these codes. Where the property is such as can pass without a written transfer or conveyance, a gift or sale to the wife, of statutory separate property, may be by parol;<sup>5</sup> although, of course, all proof must consist with the idea that delivery is for her sole and separate use, and not so as to admit the rights of her husband.<sup>6</sup> Where a conveyance or other written instrument is needful, the expression must likewise conform to the legislative intent.<sup>7</sup>

<sup>1</sup> 3 Barb. (N. Y.) 110; 74 Ala. 346, 475; 23 W. Va. 499. Upon a sale and exchange of the wife's separate, as contrasted with her general, lands, courts are sedulous to maintain that the proceeds belong to the wife. *Brevard v. Jones*, 50 Ala. 221. And where her realty, as in partition proceedings, is converted into money, the proceeds, so long as they may possibly be traced, stand in lieu of the real estate for her benefit. *Nissley v. Heisey*, 78 Penn. St. 418; *Rice v. Hoffman*, 35 Md. 344. Equity comes in aid of these principles, where statutory remedies are inadequate, and indeed of numerous kindred rules under the married women's acts.

<sup>2</sup> *Holcomb v. Meadville Savings Bank*, 92 Penn. St. 338; 13 Minn. 46 (natural increase and profits, including progeny of separate animals and rents or crops of separate lands); *Hanson v. Millett*, 55 Me. 184; 62 Ala. 41; 43 N. H. 159; *Stout v. Perry*, 70 Ind. 501.

<sup>3</sup> See 57 Ala. 85; 14 Bush (Ky.), 474; 30 Miss. 422. There might be acquiescence in her husband's acts as agent in other respects. § 118; 68 Ala. 171. Cf. 66 Iowa, 582 (husband as negotiator of a wife's purchase).

<sup>4</sup> 111 Penn. St. 124.

<sup>5</sup> *Tinsley v. Roll*, 2 Met. (Ky.) 509.

<sup>6</sup> § 117; *Walton v. Broadbush*, 6 Bush (Ky.), 328.

<sup>7</sup> *Slaughter v. Glenn*, 98 U. S. 242; *Robinson v. O'Neal*, 56 Ala. 541; 12 Bush (Ky.), 459. Under the more sweeping local statutes a conveyance to a married woman need not state that she is to hold it to her separate use. *Sims v. Rickets*, 35 Ind. 181. As to the modern effect of such phrases as "sole and separate use," as constituting a statutory separate estate, see *Lippincott v. Mitchell*, 94 U. S. 767. And see 48 Cal. 355; 69 Ind. 148; 84 Ga. 786; § 117.

131. But as concerns acquisitions of the wife from her husband, the married women's acts by no means concur in making this her statutory separate estate, as they do where the acquisition is derived from some third party. Some local legislatures, to be sure, have gone as far as this, but not perhaps the greater number.<sup>1</sup> Where a husband purchases land or personalty with his own money, and conveys or transfers it to his wife, through a trustee or otherwise, the question becomes ordinarily one of postnuptial settlement or gift, with equitable rules such as we shall consider hereafter; though sometimes the married women's act is broad enough in scope to confer the right of separate property acquisition, as such, from a husband, as well as from third persons.<sup>2</sup> Again, the wife is permitted to bestow her statutory separate property upon her husband, or waive her statutory rights to a considerable extent.<sup>3</sup>

<sup>1</sup> § 118. See 114 Mass. 167; 87 Ind. 349. Hence we defer the discussion of earnings, pin-money, postnuptial settlements, and gifts from husband to wife to later chapters, when the equitable doctrine will be considered in the same connection. See cs. 12, 14. A wife may now acquire her husband's note from a third person and enforce it. 14 R. I. 1. A title to separate statutory property cannot be vested in the wife on her husband's credit, where the statute only recognizes her right to acquire from third persons, any more than it could by his money. 23 Miss. 54; 13 Ired. (N. C.) 206. And such is the temptation to making colorable transfers to one's wife in fraud of creditors, that in controversies over title, where the legislation discourages acquisitions from the husband, the wife, as against the husband and his creditors and representatives, has been held quite strictly to her proofs of acquisition from a person other than her husband. See *Reeves v. Webster*, 71 Ill. 307; *Johnson v. Johnson*, 72 Ill. 489; *Gorman v. Wood*, 68 Ga. 524. But as to suitable writings, see 42 Wis. 548. Where a husband's creditors have such prior notice that they are not prejudiced, a wife's claim of ownership stands on a stronger footing; for it is the *bona fide* third persons misled to trust the husband who are chiefly protected. See 59 Iowa, 332.

<sup>2</sup> Where the husband appropriates such proceeds or takes other property in his own name, equity and modern statutes between them may preserve the wife's rights; she may, in the usual manner, follow her title into the new property, or else regard her trustee as remiss in duty and indebted to her. § 118.

<sup>3</sup> 53 Iowa, 57; *Bristor v. Bristor*, 101 Ind. 47; *Haver's Estate*, 140 Penn. St. 420. See further, as to husband's appropriation of her statutory

132. To eliminate a husband's control in his wife's statutory property affords great perplexity, for here the safeguards usual in equitable trusts are wanting. Nor are States agreed in the course to pursue, since the policy in one is to emancipate the wife from property restraints, while another grudges the change as tending to strip the husband of his matrimonial rights. A married woman, in order to preserve her separate property, should keep it distinct from that of her husband; and especially does the rule hold true in States where presumptions are against her exclusive right.<sup>1</sup> But where the husband has kept his wife's funds distinct from his, though changing investments from time to time, and has preserved the ear-marks, so to speak, her right to claim the property from his estate, upon surviving him, has been and is likely to be strongly asserted.<sup>2</sup>

personalty, 1 C. E. Green (N. J.), 512; 21 Iowa, 512; 47 N. H. 407; 41 Ohio St. 298; 67 Ga. 195; 17 Penn. St. 154; 47 Mo. 17.

<sup>1</sup> § 119; 11 Mich. 470; 45 Penn. St. 406; Kelly v. Drew, 12 Allen (Mass.), 107; 57 Ala. 85; Humes v. Scruggs, 94 U. S. 22; 94 Ala. 466; 70 Mo. 214 (wife's land). If certain property be purchased in part from her own funds, and in part from her husband's, whatever the form of the investment, her title extends only to the amount of her investment. 23 Miss. 54; Worth v. York, 13 Ired. 206; 54 Ill. 74; 66 Ala. 55; 65 Me. 439 (husband's interest available to his creditors); 82 Mo. 594.

The inclination of the latest cases is to protect the wife's portion of the investment against the husband or his creditors in cases of mixture, unless, in the latter instance, she has actively misled others. 158 Penn. St. 80; 153 Penn. St. 352; Bloomingdale v. Chittenden, 75 Mich. 305; Schroeder v. Loeber, 75 Md. 195; Fizette v. Fizette, 146 Ill. 328; Scrutched v. Sauter, 119 Mo. 615; 116 Mo. 169; 160 Mass. 380 (equitable rule applied). A gift to husband of wife's capital is thus less readily inferred than a trust. 146 Ill. 635. Where land is conveyed to husband and wife jointly, each is presumed to have paid one-half the purchase-money. 86 Mich. 297; Albrecht, *Re*, 136 N. Y. 91. See *post*, c. 14. And see Fitch v. Rathbun, 61 N. Y. 579 (an extreme case, but applying only as against husband or his assignee, and not as to *bona fide* third parties for value).

<sup>2</sup> § 119; Fowler v. Rice, 31 Ind. 358; Richardson v. Merrill, 32 Vt. 27; McCowan v. Donaldson, 128 Mass. 169. See further, 13 R. I. 25; 18 Fla. 707; 65 Iowa, 178.

A wife may have an equitable right to pursue her funds invested by her husband, while, until this right is asserted, the husband retains a



133. Hence the husband may become bound as trustee of his wife's statutory separate estate, real or personal, not only by express appointment, but through implication, as under the equity rule.<sup>1</sup> And since the opportunities afforded him for mixing up her property with his are very great, at the present stage of our married women's legislation, we often find her, upon surviving him, a general creditor against his estate, or the claimant of a trust fund which cannot easily be identified.<sup>2</sup>

134. As to presumptions concerning a wife's separate property, the liberality of the local statute serves as a standard for courts heedful of the local public policy.<sup>3</sup> To ascertain

legal title of which a *bona fide* transferee for value may perhaps avail himself by way of a countervailing equity. See 54 Ala. 99. A third party acting in bad faith towards the wife cannot claim as against her. 75 Mich. 305. Nor one who did not make prudent inquiry. 45 Minn. 294. And see *Brick v. Campbell*, 122 N. Y. 337.

But the wife is estopped by her own acts; as where she lets her husband take her money and long delays asking an account. 135 Ill. 482; 136 Penn. St. 588; 77 Wis. 557; 32 W. Va. 14.

<sup>1</sup> § 120; *Wood v. Wood*, 83 N. Y. 575; *Patten v. Patten*, 75 Ill. 446; *Hammons v. Renfrew*, 84 Mo. 332; *Camp v. Smith*, 98 Ind. 409. In certain States the husband is specially designated by statute as his wife's trustee — a peculiarity of legislation which is attended with peculiar consequences as to the legal title of such property. 32 Conn. 1; 43 Ala. 677; 51 Ala. 165 (suit "as trustee"); 73 Ala. 580; 43 Conn. 569; 60 Conn. 478.

<sup>2</sup> 1 Bush (Ky.), 327; *Hause v. Gilger*, 52 Penn. St. 412; *Fowler v. Rice*, 31 Ind. 258. Unlike the wife's separate estate in equity, the wife's statutory property seems often to retain its qualities after her death, as against a surviving husband. 23 Mich. 324. See further, next chapter. The wife may have her separate property placed in a trustee's control, so as to exclude her husband. *Kirkpatrick v. Clark*, 132 Ill. 342.

<sup>3</sup> § 120 a. In various States, the presumption is still, or was lately, in absence of suitable words or circumstances manifesting an intent on the part of those interested to claim the benefits of the statute, that a married woman's property belongs to her husband as at the common law; so that his possession of the property, undisputed and unexplained, or even a visible possession thereof in connection with his wife, would give him the marital dominion. 34 Me. 148; 35 Miss. 369; 10 Cal. 9; 158 Mass. 388; 43 Ill. 52; 51 Ga. 13; 71 Ill. 307; 6 Wis. 338; 13 Iowa, 94. While a husband and wife both live on her land held as general estate, the possession of the products is presumptively his. 14 Bush (Ky.), 474; 152 Mass. 208. But cf. 80 Mich. 422. The Pennsylvania rule has fluctuated with

as a fact whether the ownership be in wife or husband, evidence of how the matter was understood and treated between the spouses may be quite essential; for a sort of joint visible possession on their part is often the practical situation of the case.<sup>1</sup>

135. The requirement in a few States is that a schedule or inventory of the wife's separate property shall be made out and recorded in order to afford protection for her separate

legislative policy. See 13 Penn. St. 480; 53 Penn. St. 258; 154 Penn. St. 258. On the other hand, the New York courts presume very liberally for the wife, and our constant difficulty in asserting a principle is that changes in all married women's acts tend in the direction of making her more and more independent in her property relations. § 120 *a*; 41 Barb. (N. Y.) 467; 27 N. Y. 277; 42 Ark. 62; 80 Mo. 626; 38 Neb. 61; 45 Minn. 298; 128 Ill. 480; 72 Ala. 406. Where the investment stands clearly by writing in the wife's name, the decided tendency is in this country to deem it *prima facie* her independent property without requiring the use of such words as "separate" to exclude the husband. Qualter's Estate, 147 Penn. St. 124; Long v. McKay, 84 Me. 199; 30 Mich. 422 (obvious inclination to determine, not by presumptions or inferences, but upon the facts). And see 101 N. Y. 77 (possession of wife's land); 131 N. Y. 121.

<sup>1</sup> "Between strangers, open, visible, notorious, and exclusive possession is the test of title in all cases where the rights of creditors are involved. But this is not possible with reference to the personal goods of a married woman. She cannot have or use her property exclusively, unless she lives apart from her husband. It was not the intention of the legislature to compel a separation in order to save the wife's rights; but if the rule of exclusive possession were adopted, the statute would be inoperative as long as they live together. But this shows how necessary it is to demand the clearest proof of the wife's original right." Gamber v. Gamber, 18 Penn. St. 363. Of course the wife's separate property may exist even though husband and wife do not live together. 49 S. W. 1000. A gift of the income of the wife's property, where her husband manages it, will be more readily presumed than a gift to him of the corpus; and income from both spouses goes often thus for family and household expenses. Haver's Estate, 140 Penn. St. 420.

Under our latest married women's acts, the courts are less than ever disposed to presume that a husband who receives a fund of his wife's takes it to himself as his own by virtue either of marital authority or as an intended gift from her. He is rather supposed to receive it as her trustee or managing agent and to be accountable accordingly. 101 Penn. St. 101; § 120 *a*; 45 Minn. 298; 157 Mass. 228. Cf. 139 Ill. 424. But

benefit.<sup>1</sup> If some such registry system were practicable to make the wife's property distinguishable by third parties from her husband's, it would relieve the situation from much fraud and uncertainty as to such parties.

136. As between statutory and equitable separate property, it is held that the married women's act does not oust the original jurisdiction of courts of equity in cases affecting the separate estates of married women.<sup>2</sup> Our marital legislation, in other words, applies solely to the wife's statutory separate estate, and a separate equitable estate may still be created by deeds of trust or otherwise, subject to the same rules of equity as heretofore.<sup>3</sup> But in case of doubt the preference appears to be in favor of a statutory separate estate.<sup>4</sup>

137. The equitable protection of married women's property, which, as we have stated, had been quite sparingly exercised in the United States prior to the first legislative enactments on this subject, has received a fresh impulse from the married women's legislation. Where the separate use has been recognized and enforced at all, the strict American rule was always borrowed from that of England. And the latest cases show an increasing liberality to the wife in our courts of equity.<sup>5</sup>

all such presumptions, in one direction or the other, yield to evidence of the facts. See 157 Penn. St. 246.

<sup>1</sup> § 121; 8 Fla. 136; 30 Ark. 79; 7 Cal. 266; 59 Tex. 470. But see 44 Iowa, 448; 42 Ark. 62. There may be thought something inquisitorial in such enactments.

<sup>2</sup> 23 Miss. 286; 36 Penn. St. 410, 414; 22 Barb. 371; *Wood v. Wood*, 83 N. Y. 575. As regards the wife's individual property, the married women's legislation has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies. 26 Mich. 106. And see *Clawson v. Clawson*, 25 Ind. 229.

<sup>3</sup> *MacConnell v. Lindsay*, 131 Penn. St. 476; 88 Ala. 431; 96 Va. 749. Such trusts are often created by a devise or will, or under a marriage settlement.

<sup>4</sup> § 122; *Bolman v. Overall*, 86 Ala. 168.

<sup>5</sup> § 123. For the American development of such doctrines, see §§ 123 *et seq.* and cases cited. As in English equity, the court will treat the husband as trustee if necessary and no designated trustee is required. § 123; *ante*, 116. For words or phrases creating separate use, see § 124;

*ante*, 117. Produce and income are embraced as well as capital. § 125; *ante*, 118. The identity of separate property should be preserved. § 126. And see *ante*, 132. Separate use is ambulatory, existing only in the marriage state. § 127; *ante*, 119. Husband's marital obligations remain usually unaltered. § 128; *ante*, 121. Restraint upon anticipation is not so clearly recognized here as in England. § 129. Cf. 122. See also Schouler, *Hus. & Wife*, § 224 *et seq.*

## CHAPTER X.

### THE WIFE'S DOMINION OVER HER EQUITABLE SEPARATE PROPERTY.

138. The right to enjoy property carries with it, universally, as a necessary incident, the right of its free disposal. All other things, then, being equal, we shall expect to find that married women, when allowed to hold estate to their separate use, are permitted to sell, convey, give, grant, bargain, or otherwise dispose of it; and further, to encumber it with their debts as they please. Public policy may, however, restrain their dominion. Our present discussion relates to the wife's dominion over her equitable separate property.<sup>1</sup>

139. Apart from such restraints as the clause against anticipation, it is the general rule, in England, so far at least as concerns personal property, that from the moment the wife takes the property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it; for, upon being once permitted to take personal property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*, and may deal with the property as she pleases, either by acts *inter vivos*, or by testamentary disposition.<sup>2</sup>

140. The same principle applies to the income and profits and rents of the wife's separate property. The wife has the same

<sup>1</sup> § 130.

<sup>2</sup> § 131; 1 Ves. Jr. 48; 3 Bro. C. C. 9. As to restraints imposed, see *ante*, 122; 9 Ves. 369; 17 Beav. 581; 1 Mac. & Gord. 601. Her power of disposition is not confined to interests vested in possession, but extends to reversionary interests settled to her separate use. 13 Ves. 192; 2 Russ. & M. 360.

control over her savings out of her separate estate as over the separate estate itself.<sup>1</sup>

141. But as to disposing of real estate the wife's power in this respect is affected by technical difficulties as to the method of executing conveyances.<sup>2</sup> In most parts of the United States a married woman can only dispose of her real estate, whether legal or equitable, by a conveyance according to statute, which the husband executes in token of assent, unless at least the trust states differently; a partial reason for this being that the husband has his rights of curtesy even in lands settled to his wife's separate use.<sup>3</sup>

142. Liability of separate property to the wife's debts or engagements is a corollary of the wife's dominion over it. After much reluctance and delay it has become at length the settled doctrine of the equity courts of England that the engagements and contracts of a married woman, whether general or relating specifically to her separate property, are to be regarded as constituting debts, and that her property so held is liable to the payment of them, whether the contract be expressed in writing or not; and all the more so if she lives apart from her husband, and the debt could only be satisfied from her separate property.<sup>4</sup> But while the contract for payment of money made

<sup>1</sup> § 132; *Gore v. Knight*, 2 Vern. 535; *Newlands v. Paynter*, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; *Cheever v. Wilson*, 9 Wall. (U. S.) 108. Otherwise where she is expressly restrained from anticipation. 3 Johns. Ch. (N. Y.) 77.

<sup>2</sup> § 133. But see *post*, as to a wife's power of appointment; and English rule as suggested; 8 Ves. 266; § 133.

<sup>3</sup> § 133; 5 B. Mon. (Ky.) 163; 13 W. Va. 572; 25 Gratt. (Va.) 393; 36 Ohio St. 584; 73 Ind. 343; *Albany Fire Ins. Co. v. Bay*, 4 Comst. (N. Y.) 9; 5 C. E. Green (N. J.), 109. But see *ante*, 105; also the latest local statute. Rents and profits of her separate land, or an annuity charged upon land, follow the more liberal rule of personal property held as her separate estate, unless afterwards converted into land. *Cheever v. Wilson*, 9 Wall. (U. S.) 108; 2 Leigh (Va.), 183; 2 R. & M. 355; *McChesney v. Brown*, 25 Gratt. (Va.) 393.

<sup>4</sup> See § 134 and cases cited which made precedent towards this conclusion. 4 Russ. 112; 2 Drew. 184; *Owens v. Dickenson*, Craig & Phil. 48; *Picard v. Hine*, L. R. 5 Ch. 274. "Inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity

by a married woman having separate estate creates a debt, it is, practically considered, only a debt *sub modo*, when compared with the debt of a man or of an unmarried woman. It cannot be enforced against her at law; and it is enforceable in equity, not on the ground that she incurred a personal obligation, but because there is property upon which the obligation may be fastened.<sup>1</sup> As a general rule, in England, wherever a married woman, having property settled to her separate use has entered into any contract by which it clearly appears that she intends to create a debt as against herself personally, it will be assumed that she intends that the money shall be paid out of the only property by which she can fulfil the engagement; and thus may she bind her separate estate.<sup>2</sup>

143. In still later English decisions a new turn—and that towards the better protection of wives having separate property against their own imprudent disposition thereof—is indicated, which we may attribute in some measure to the legislative changes concerning married women's rights, agitated on both sides of the ocean, and the influence of contemporaneous American equity decisions evoked by the prior legislation of our respective States upon the subject. Where a married woman contracts any debt which she can only satisfy out of her separate estate, her separate estate will still, in equity, as a rule be made liable to the debt.<sup>3</sup> Doubt takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied." Lord Cottenham in *Craig & Phil.* 48.

<sup>1</sup> § 134. There cannot be a decree against a married woman *in personam*; the proceedings are simply against her separate property *in rem*. 1 Bro. C. C. 16; 1 Myl. & Cr. 111. And see § 134, as to exemption of surviving wife as to her person and general property. Cf. 3 H. & C. 576, as to surviving wife's promissory note. If separate property is held by trustees the decree is against them.

<sup>2</sup> § 134; *Earl v. Ferris*, 19 Beav. 69; 25 L. J. Eq. 26 (compromise of a suit); 2 H. & N. 199. A former doctrine of equitable appointment seems to be exploded. *Johnson v. Gallagher*, 3 De G. F. & J. 494.

<sup>3</sup> § 135; *Picard v. Hine*, L. R. 5 Ch. App. 274; *London Bank of Australia v. Lempiere*, L. R. 4 P. C. 572, 594 (banker's lien for overdrafts); L. R. 3 Eq. 787.

is thrown, however, upon the extent of the binding force of debts imprudently incurred by her and engagements not for the wife's benefit; and, on the whole, the test in chancery seems to be settling, at the present day, towards regarding whether the transaction out of which the demand arose had reference to, or was for the benefit of, the wife's separate estate; and, on the whole, unsatisfactory as may be any abstruse discussion, circumstances are likely to determine the decision of each case, with perhaps a growing partiality in favor of a married woman's rights, and a growing indisposition to make her harshly suffer.<sup>1</sup>

144. In this country, whenever the wife's separate use has been admitted as a doctrine of equity, independently of statute, her right of dominion has also been recognized.<sup>2</sup> In general, however, it is to be observed that the American equity doctrine of the wife's power to charge her separate estate, independently of the married women's acts, has fluctuated somewhat, as have likewise the English cases, and that not only do American courts find difficulty, like those of England, in encountering cases where the liability incurred was disadvantageous to the wife, and at the same time not clearly charged by her upon her separate property; but this further source of perplexity appears moreover, namely, that local legislation, in these later years, places the rights of married women on quite a novel footing. Hence a course of precedents, of later

<sup>1</sup> § 135; *Johnson v. Gallagher*, 3 De G. F. & J. 494 (1861).

Equity will not enforce demands against separate estate to which the wife became entitled after the time of her engagements to pay, nor against separate estate which was subject to a restraint on anticipation. *Pike v. Fitzgibbon*, 17 Ch. D. 454; 23 Ch. D. 712; 30 Ch. D. 169. There must have been some separate property at the time of the charge, for the charge to take effect at all. *Stogdon v. Lee*, [1891] 1 Q. B. 661. As to a judgment debt owing to her, see 24 Q. B. D. 103. Statute changes this. [1891] 2 Q. B. 422.

<sup>2</sup> § 136; *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548 (a leading case); 1 Johns. Ch. 450; 3 *Id.* 77; 140 N. Y. 54; *McChesney v. Brown*, 25 Gratt. (Va.) 393; *Patton v. Charlestown Bank*, 12 W. Va. 587; *Wells v. Thorman*, 37 Conn. 319; *Leaycraft v. Hedden*, 3 Green Ch. (N. J.) 512; *Fears v. Brooks*, 12 Ga. 200; *Bradford v. Greenway*, 17 Ala. 805; *Shipp v. Bowmar*, 5 B. Mon. (Ky.) 163; *Kirwin v. Weippert*, 46 Mo. 532.



years, hardly less abstruse and irreconcilable than those of the English chancery, but somewhat independent of them.<sup>1</sup>

145. Between property subject merely to the wife's power of appointment and property settled to her sole and separate use there is a difference. In the former instance she may dispose of the estate by executing an instrument according to the strict letter of her authority. In the latter, she is invested with a beneficial interest and enjoyment, however restricted may be the dominion allowed her by the donee. In general, equity permits a married woman to dispose of property according to the mode, if any, prescribed by the instrument under which the separate use is created.<sup>2</sup>

146. A married woman may bestow her separate property upon her husband by virtue of her right of disposal, and this whether by gift or for valuable consideration; unless re-

<sup>1</sup> § 136. When services are rendered her by her procurement, or she contracts a debt generally, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her separate property as an equitable lien. 36 N. Y. 600; 37 N. Y. 35; 5 C. E. Green (N. J.), 109; 29 Ark. 444; *Dale v. Robinson*, 51 Vt. 20; 12 R. I. 79; 18 Fla. 809. And so, too, in contracting a debt for the purchase-money of her separate estate. *Turner v. Kelly*, 70 Ala. 85; 39 Ark. 357; 94 Penn. St. 286; 99 Penn. St. 286. See strict rule in *MacConnell v. Lindsay*, 131 Penn. St. 476. See as to a vendor's lien, 84 Ind. 594.

If the wife's separate estate is for life, she may charge it freely for that period. 76 Va. 207.

The difficulty comes in charging for debts not beneficial, or in fixing the nature of evidence required. The bearing of local legislative policy in this connection is locally important; and chancery usually inclines (though not uniformly) to apply one and the same rule to statutory and equitable separate estate. See § 136; 15 Gray (Mass.), 328; 51 Miss. 172; 56 Ala. 541; 37 N. Y. 35; 36 W. Va. 794.

Only such separate estate as the wife had at the time of the engagement is bound; and not that acquired later. *Ankeny v. Hannon*, 147 U. S. 118; *Pickens v. Kniseley*, 36 W. Va. 794; *Crockett v. Doriot*, 85 Va. 240. But cf. 60 Miss. 870.

<sup>2</sup> § 136 a; 25 Gratt. (Va.) 393; 86 Ill. 1; 17 Johns. (N. Y.) 548; *ante*, 141. As to a power of sale in a mortgage to her, see 58 Md. 491. Power of appointment may be by will and not by deed. 28 W. R. 73.

strained by the terms of the trust.<sup>1</sup> She may exempt him from the payment of interest, giving him the income.<sup>2</sup> So may the wife, unless specially restrained by the trust, and where fraud or undue influence do not appear, bind her equitable separate property for her husband's debts.<sup>3</sup>

147. The concurrence of the trustee of the fund is not essential to the validity of her disposition thereof, according to the rule of chancery both in England and America.<sup>4</sup> Unless her dominion is expressly restrained the trustees must give legal effect to her act accordingly.<sup>5</sup> But if, on the other hand, the instrument requires the written approval of the trustee expressed in a certain manner, that requirement must be com-

<sup>1</sup> § 137; 1 Russ. & M. 190; *Charles v. Coker*, 2 S. C. n. s. 123; 15 Ves. 596 (wife's bond).

<sup>2</sup> *Galt v. Smith*, 145 Penn. St. 167. But acts of this sort are very closely scrutinized; the evidence must be clear; and undue influence on the part of the husband, or the fraud of both husband and wife upon creditors of either, may suffice for setting them aside in equity. See 1 Ves. 189; 9 Ves. 360; *Richardson v. Stodder*, 100 Mass. 528; *Shirley v. Shirley*, 9 Paige (N. Y.), 363; *Fargo v. Goodspeed*, 87 Ill. 290. As to rights of *bona fide* party without notice, see 56 Miss. 316; *Dixon v. Dixon*, L. R. 9 Ch. D. 587.

<sup>3</sup> § 137; 2 U. S. Eq. Dig., Hus. & Wife, 18; 2 S. C. n. s. 123.

So as to her mortgage jointly with her husband to secure his debts, in which case she is to be regarded as his surety. *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; 18 Barb. (N. Y.) 561; *Bartlett v. Bartlett*, 4 Allen (Mass.), 440; *Short v. Battle*, 52 Ala. 456; 28 Ill. 20; *Watson v. Thurber*, 11 Mich. 457; 32 Fla. 481; 58 N. H. 490; 36 N. J. Eq. 48; 66 Ala. 476; 58 Conn. 542. But a local statute must be followed. 87 N. C. 106. She may pledge her separate personal property as security in like manner. 7 S. C. 88; *Barrett v. Davis*, 104 Mo. 549. She may draw drafts on the trustee of her separate property by way of binding the property. *Bain v. Buff*, 76 Va. 371. And her separate estate will be bound by any debt properly contracted by her, even though her husband should be the creditor. *Gardner v. Gardner*, 7 Paige (N. Y.), 112. But she cannot charge her separate estate to indemnify the surety on a recognizance of her son. *Chandler v. Morgan*, 60 Miss. 471. Nor will she be charged against her benefit where she gives no valid security upon such property. 19 Fla. 275.

<sup>4</sup> § 138; 14 Ves. 542; *Corgell v. Dunton*, 7 Penn. St. 532; *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548.

<sup>5</sup> 2 H. & N. 199; 7 Paige (N. Y.), 1; 20 N. Y. 476; *Knowles v. Knowles*, 86 Ill. 1. But bad faith or fraud affecting the validity of the conveyance may be set up; or the obstruction of some local statute. *Id.*

plied with to make even the joint conveyance of husband and wife effectual;<sup>1</sup> and it is incumbent on every trustee to see that all restrictions on the wife's dominion over the fund are duly respected.<sup>2</sup>

148. The wife's active participation in a breach of trust may bar her right to separate estate.<sup>3</sup> But on the other hand, to preclude the wife from the right to relief simply because she has improperly permitted her husband to receive the trust funds, would be to defeat the very purpose for which the trust was created, — namely, her protection against her husband. Hence, the court must be satisfied that the husband has not in any degree influenced her acts and conduct, before it holds her separate estate to be affected; and this, upon the most jealous investigation.<sup>4</sup>

149. A wife is precluded from recovering the arrears of income on her separate estate for more than a year, upon the ground of a supposed gift to her husband, according to the English chancery rule.<sup>5</sup>

<sup>1</sup> *Gelston v. Frazier*, 26 Md. 329; 81 Va. 380.

<sup>2</sup> 2 R. & M. 86; *McClintic v. Ochiltree*, 4 W. Va. 249. See 55 Md. 318; *Kirkpatrick v. Clark*, 132 Ill. 342.

See further, § 139, as to whether the wife must be specially restrained under the trust; 3 Johns. Ch. (N. Y.) 77; *Tullett v. Armstrong*, 1 Beav. 1.

<sup>3</sup> § 140; 19 Ves. 635.

<sup>4</sup> 9 Hare, 773; *Carpenter v. Carpenter*, 27 N. J. Eq. 502; *Clive v. Carew*, 1 John. & Hen. 199. As to fraudulent collusion by husband and trustee, see *Dixon v. Dixon*, L. R. 9 Ch. D. 587.

<sup>5</sup> § 141; *Rowley v. Unwin*, 2 Kay & Johns. 142; *Arthur v. Arthur*, 11 Ir. Ch. 518. And see further, 2 Perry, Trusts, § 665, and cases cited. § 141.

Such a rule cannot operate where the facts contradict such a gift. 202 Penn. St. 201 (husband signing as wife's attorney, etc.).

## CHAPTER XI.

### THE WIFE'S DOMINION OVER HER STATUTORY SEPARATE PROPERTY.

150. The doctrine of the wife's dominion over her separate estate is more generally asserted, in the United States at least, at this day, with reference to the married women's acts; and some of the later cases show important variations from the equity rule, as we shall proceed to notice. The decided change seems to date, in American chancery, from the passage of the important married women's acts, or about 1848, and in most States at this day to affect equitable remedies with reference to both the statutory and equitable separate estate of the wife.<sup>1</sup>

151. English and American decisions at this day favor the conclusion that the debts of a married woman having separate property are only to be surely charged by a court of equity upon that separate property, and payment enforced out of it, when it was contracted by her for its benefit, or expressly made a charge thereon or expressly contracted on its credit;<sup>2</sup>

<sup>1</sup> *Ante*, 142, 143.

<sup>2</sup> See § 143; *ante*, 143; 5 C. E. Green (N. J.), 109; 31 Ind. 92; 36 Ind. 413; *Patrick v. Littell*, 36 Ohio St. 79; *Westgate v. Munroe*, 100 Mass. 227; *Nash v. Mitchell*, 71 N. Y. 199; 46 Md. 349; 46 Tex. 35; *Williams v. Hugunin*, 69 Ill. 214; 29 Ark. 346; *Pippen v. Wesson*, 74 N. C. 437; 58 Vt. 474; 44 Mich. 80, 96.

For a discussion of the important case of *Yale v. Dederer* (18 N. Y. 265; s. c. 22 N. Y. 450; s. c. 68 N. Y. 329), see § 144. Its doctrine in this respect, whether by statute or judicial decision, finds direct support from 3 R. I. 79; 17 Iowa, 393; 7 C. E. Green (N. J.), 127; *Hodson v. Davis*, 43 Ind. 258; 2 Tenn. Ch. 768; *Nelson v. Miller*, 52 Miss. 410; 15 Gray (Mass.), 328. And see English case, 3 De G. F. & J. 494. But other cases are to the contrary. *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Mayo v. Hutchinson*, 57 Me. 546; *Todd v. Lee*, 15 Wis. 365; § 143.

The rule is regarded as settled in New York, that, in order to charge

and, of course, to the extent only to which the wife's power of disposal may go.<sup>1</sup> And, to suit a later phase of the doctrine, such charges are not upon separate property which at the date of her engagement had no existence and was not contemplated.<sup>2</sup>

152. Benefit or express intention appear to be alternate in their present application, whether with reference to the equitable or the statutory separate property of a married woman. Benefit is not the sole test; but, to the extent of her power of disposition over her separate estate, the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory (upon which point States differ), and provided, of course, that the transaction was voluntary on her part, and not fraudulently procured.<sup>3</sup>

153. For family necessities and articles for the support of the household, as well as her own comfort, various codes now render a wife's property expressly liable, wherever at least the sale was made on the faith of such property or upon her credit;<sup>4</sup>

the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in the instrument. *Yale v. Dederer*, 68 N. Y. 329. On this point State rules differ. 47 Mo. 505.

<sup>1</sup> See *Hix v. Gosling*, 1 Lea (Tenn.), 560. See *Schouler, Hus. & Wife*, § 258, *ante*, 143, and cases cited. Where the debt was contracted upon the express faith of a legacy fairly expectant, the creditor was favored, in *Renz Re*, 79 Mich. 216.

<sup>2</sup> *Ankeny v. Hannon*, 147 U. S. 118; 106 N. C. 289. The very recent emancipation of married women by legislative acts does not remove them from the consideration of the courts when questions of improvidence, hardship, and oppression in their contracts require judicial attention. *Friend v. Lamb*, 152 Penn. St. 529.

<sup>3</sup> § 144; *Patrick v. Littell*, 36 Ohio St. 79; *Yale v. Dederer* and other cases, *ante*, 151. Circumstances may justify such inference. *Conlin v. Cantrell*, 64 N. Y. 217; *Harshberger v. Alger*, 31 Gratt. (Va.) 52.

<sup>4</sup> § 144 *a*; 85 N. Y. 516; 66 Ala. 315; 68 Ala. 402; 73 Ala. 227; 60 Iowa, 148. The article must have been actually used in the family. 55 Iowa, 702. And see 79 Ky. 279. A joint purchase of necessities by husband and wife is presumed to be on the husband's sole credit. 103 Penn. St. 396. But where the husband was known to be insolvent, reliance is placed rather upon the wife's property. 70 Ala. 522.

Apart from such statutes clear proof of the wife's intent to contract on

and the liability thus indicated is sometimes her own, though more naturally that of the husband or of both husband and wife; while in some States the wife stands like a surety for her husband.<sup>1</sup>

154. As to binding the wife as surety or guaranty of another our local codes are discordant.<sup>2</sup>

155. Inquiry into consideration is always pertinent under the equity rule, and in States where the wife is not invested with plenary power of legal disposition under appropriate statutes. This applies to the wife's promissory note, which, as the law stands, apart from statute, cannot be a safe investment for any one; for its value consists in the proof that it her credit has been needful in equity. 114 U. S. 430; *ante*, 151; 51 Conn. 479.

Medical services rendered to a wife are family expenses or necessities under such a code. 80 Iowa, 243. Otherwise as to medical services to her husband, where the code is not explicit. 75 Mich. 397. And so is a suit of clothes purchased by the wife for a minor son. 79 Mich. 360; 83 Mich. 116. As to the wife's own apparel, see 103 Ind. 512. But not rent of a farm which the husband carries on as a business enterprise. 82 Iowa, 596; though as to rent for a family home, see 37 Ill. App. 30. Nor does feed to the wife's horses which the husband used in his business, come under the rule. 82 Me. 65. Formalities as to suit, &c., guarding the wife's interest must follow the local statute. 19 Ore. 233; 104 Mo. 44; 131 N. Y. 350. See further, 86 Ga. 696; 92 Ga. 769.

<sup>1</sup> 36 Neb. 604.

<sup>2</sup> § 145; 39 Ohio St. 516; 24 S. C. 51; 61 N. H. 129. Restriction still in 87 Mich. 121; 34 Neb. 817. In some States a wife cannot make herself liable on her contract of suretyship for any one, even where she may enter into an original undertaking. 79 Ky. 29; 87 Ga. 393. Some States assert a distinction between her equitable and statutory property in such matters. 86 Ala. 168. Accommodation acceptance or indorsement is within the "surety" restriction of statute. 86 Ga. 780. Or payment of insurance premiums for another's benefit. 84 Ga. 309.

Sometimes the prohibition of surety applies more exclusively against the husband. 1 Allen (Mass.), 258; 44 N. H. 592. And see as to a married woman's promissory note in this connection, § 145; 91 Ill. 138; 40 Mo. 61; 36 Penn. St. 131; 6 C. E. Green (N. J.), 269.

Where a local statute empowers a wife freely to "enter into any contract" in reference to her property, restrictions of this kind are removed; though the Statute of Frauds must apply to her oral promise to be liable for another. § 145; 82 Me. 65; 74 N. Y. 82; 96 N. Y. 534; 23 Minn. 337. Cf. 91 Ill. 138; 44 N. J. L. 245.

was a contract on her part, and a binding contract, relative to her separate property, within the general rule. The finding of facts by the jury or trier settles such a question.<sup>1</sup> Although in numerous instances statutory requisites for making the contract binding in law may be wanting, equity will bind her property, nevertheless, where she or her estate has received the benefit of the transaction.<sup>2</sup>

156. Equity will charge a debt, and even one with mortgage or other collateral security upon specific property, upon the wife's separate property generally at the time of the engagement, so long as the debt was contracted for the benefit of her separate property.<sup>3</sup> At law, of course, there may be no such remedy; yet local legislation frequently extends the legal rights of a married woman in this same direction.<sup>4</sup>

<sup>1</sup> § 146. The local rule sometimes distinguishes between binding by a mortgage and enforcing the mortgage note. Cf. 112 Mass. 271; 125 Mass. 28, 587 (statute change). As to presumption of benefit, cf. 43 Conn. 569; 116 N. Y. 810. And see 49 Mich. 538; 140 U. S. 516; 65 Vt. 281; 133 Penn. St. 544. But whether by promissory note, bond, oral or written promise, the instrument and the proof, taken together, must disclose the intention to charge her separate estate expressly, or else some beneficial object for which the money was raised. 47 Conn. 23 (loan to wife). Cf. 34 S. C. 175; 85 Ga. 200. As where she gives bond or note. 69 N. Y. 87; 29 La. Ann. 123. As to *bona fide* transferee without notice, see 70 Ga. 322. Or confesses judgment, 64 Md. 95. As to binding by an official bond, see 74 Wis. 582. As to conveyance, see 62 Ga. 733; 86 Wis. 399.

<sup>2</sup> Donovan's Appeal, 41 Conn. 551.

We speak here with a constant reservation of *feme sole* liabilities acquired under local statutes which may affect at any time, and even reverse all such issues; for after all, as the latest married women's acts are construed in some States, a wife is *sui juris* except perhaps as to her husband, and may bind her separate property with little or no restriction; as by giving a bond or her promissory note, or by indorsing or by way of guaranty. § 146; 75 Mo. 280; 68 Ga. 255; 94 Ind. 501; 15 S. C. 602; 160 Mass. 418; 150 Mass. 574; 88 Ky. 46. To repudiate a note or other engagement, and thus destroy the consideration given her, should leave the other party free to pursue the consideration. 148 Penn. St. 47. The accommodation indorser of a married woman's note impliedly guarantees her competency. 51 N. J. L. 547. Consult local code and practice.

<sup>3</sup> *Armstrong v. Ross*, 5 C. E. Green (N. J.), 109.

<sup>4</sup> See local codes as to practice in this respect.

157. A married woman cannot become personally liable on her general or executory promise except it concern expressly, under general rules, her benefit or her separate estate. A married woman's personal incapacity to contract is still the law's assumption unless the statute is explicit on such a point; though here, as elsewhere, statutory intent is to be fairly and not technically construed.<sup>1</sup>

158. Miscellaneous points are sometimes considered in this connection.<sup>2</sup>

<sup>1</sup> § 148; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Pippen v. Wesson*, 74 N. C. 437; *Stokes v. Shannon*, 55 Miss. 583. The wife's note otherwise given is void, even in the hands of a *bona fide* holder. 43 Mich. 564. Her bond for payment of money does not bind her personally. 77 N. C. 392; *Vandyke v. Wells*, 103 Penn. St. 49. She cannot become a general borrower, even though she give a promissory note or security in the same connection. 31 Ind. 111; 47 Conn. 23; 49 Miss. 705. She is not liable on her mere contract to convey or purchase land. 92 Ind. 262; 109 Mo. 338; 94 Ala. 369. See 88 Ky. 648, as between an executory and executed sale of land. Her general engagements, in a word, without the scope of the general rules we have stated, will create no charge upon her separate property enforceable in equity. 69 Ill. 214; 26 N. J. Eq. 504; 29 Ark. 346; 85 Ill. 197; 103 N. C. 296. Some States, however, under their liberal enabling acts, and especially the later ones, repudiate such restrictions upon the *jus disponendi*. See 118 Mass. 402; 27 N. Y. 277; 47 N. H. 262; 57 N. H. 382; 87 Va. 478 (contract to convey land); 109 Mass. 79; 79 Tex. 551; 24 Iowa, 298; 52 N. J. L. 36.

As to the wife's purchase on credit under the foregoing rule there has been much logical confusion; but credit was not considered so much as the consideration of that credit. It has been treated as a voidable contract on her part. 50 Miss. 56. But equity does not permit repudiation while holding the property or other consideration. § 148.

<sup>2</sup> § 149. Concerning the purchase of real estate by the wife the doctrine is not uniform. See 129 Ind. 478; 80 Mich. 472.

A married woman has the usual liability of stockholders when she holds stock. 14 Fed. (U. S.) 405; *Bundy v. Cocke*, 128 U. S. 185 (national bank). As to enforcing such liability, see 133 U. S. 139; 38 Fed. (U. S.) 700; 39 Fed. (U. S.) 554. As to transfer of her stock with or without her husband's joinder, local statute controls. 117 Mass. 241. As to the wife's dealings with a stockbroker, see 42 N. J. Eq. 60. See as to pledge of her stock, 94 Penn. St. 76.

Counsel fees and professional services in the wife's property suits are sustained more or less liberally in various States. See § 149; 3 R. I. 79 (equity); 87 Ill. 260 (divorce); 36 N. Y. 600 (liberal rule); 79 Ind. 259; 55 Miss. 66; 66 Md. 106.



159. The husband must join the wife in contracts and conveyances relating to her separate property according to the rule of various States; and particularly is this true of transactions concerning the wife's real estate, upon which topic we have already spoken.<sup>1</sup> For, aside from radical legislative changes, husband and wife were always differently regarded in this respect; he having complete control over his own property, while she had only such control as equity or the modern statute might confer over hers. The language of the later married women's acts in many States, however, authorizes the inference that nothing further than the written concurrence of the husband is requisite to complete the validity of the wife's transfer of her separate personal property; nor is even this always held essential.<sup>2</sup> And in some States the wife's sole deed of her separate real estate is sufficient to pass her entire interest;<sup>3</sup> though, so antagonistic is this to the old common law, that a clearly enabling statute should be required.<sup>4</sup>

<sup>1</sup> *Ante*, 141; 44 Penn. St. 224; 2 Beas. (N. J.) 232; 19 Ind. 117; 67 Ala. 360; 13 Ohio St. 565; 131 Penn. St. 573.

<sup>2</sup> § 150; 45 Md. 1. A married woman can go into insolvency without her husband's joinder. 48 Minn. 93.

<sup>3</sup> 47 Me. 330; 11 Mich. 33; 8 Neb. 264; 117 Mass. 105.

<sup>4</sup> § 150. The old rule is thus considerably changed in many States. See *ante*, c. 6. Hence we see accordingly her sole contract in writing for purchase upheld and specific performance decreed against her. 38 N. H. 29; 5 Allen (Mass.), 103; 109 Mass. 79; 52 N. J. L. 370 (her bond). Her covenants in the deed are upheld against her. 40 Ala. 561; 26 Iowa, 474; 128 Mass. 466; 129 Mass. 554. Or her sole conveyance by a duly authorized agent. 61 Neb. 537. And see 106 N. C. 512; 47 Iowa, 47 (ratification of a defective conveyance); 101 Ind. 200 (dedication of a street appurtenant).

A wife cannot set up an equitable title afterwards to the injury of a *bona fide* purchaser without notice; nor assert a present or subsequent title after duly conveying her interest. § 150; 54 Tex. 115; 44 Md. 108; 51 Ala. 318; 125 Mass. 25; 56 Ind. 1. An after-acquired title by her enures to her grantee. 144 Ill. 32. The recitals of her acknowledgment may be relied on. 84 Penn. St. 442; 76 Ill. 611; 45 Cal. 580; 32 N. J. Eq. 103.

See further as to the wife's lease and covenants, 39 N. H. 196; 117 Mass. 62; 52 Md. 297; 82 Ind. 129; 75 Ala. 188.

For statutory restraints upon her alienation, see 85 Ind. 117; 33 Kan. 572; § 150 *a*; 108 Ind. 174, 292; 96 Penn. St. 298 (husband's debts).

160. The wife's debts for improvements upon lands conveyed to her have been enforced in several late instances.<sup>1</sup> So, too, the joint contract or joint note of herself and husband, or in some States her sole note or sole contract, for lumber and materials to be used thereon.<sup>2</sup> Apart from permanent improvements, a married woman's real estate may well be rendered liable for repairs made to her separate estate at her own request, and as necessary for its due preservation and enjoyment.<sup>3</sup>

161. The husband's intervention in his wife's real estate transactions is considered under our local statutes. Usually his *bona fide* investment in improving his wife's lands cannot be subjected to his own or his creditors' claims, except on the usual principles.<sup>4</sup> It is a general principle that the wife's separate property cannot be made liable for the debts of her husband or others without her assent, whether by security or otherwise.<sup>5</sup> But a mortgage given by a married woman upon

<sup>1</sup> § 161; 13 Wis. 125; *Fowler v. Seaman*, 40 N. Y. 592; 5 Minn. 155; 80 Mich. 472.

<sup>2</sup> § 161. As to mechanic's lien, see 7 R. I. 441; 13 Ohio St. 131; 62 Conn. 75; 145 Ill. 389; 90 Ky. 380; 71 Ind. 159; 153 Penn. St. 208; 69 Ill. 452; 25 Fla. 118; 5 Bush (Ky.), 392. A husband acting as his wife's agent in purchasing materials and supervising the erection of buildings on her land cannot bind her by his adjustment of the amount due, against her right to question and ascertain the facts. *Parker v. Collins*, 127 N. Y. 185. See § 155.

<sup>3</sup> Where a wife buys land, gives her notes in payment, and enters with her husband and makes improvements, the vendor's lien for his purchase-money is favored at this day to the full extent. *Bedford v. Burton*, 106 U. S. 338. Independently, however, of enabling statutes, the written contract of a married woman, for materials and labor used to improve her separate estate, is void at law. *Williams v. Wilbur*, 67 Ind. 42. And where she borrows money to make unnecessary repairs, the lender is not favored. *McMullen's Appeal*, 107 Penn. St. 90.

<sup>4</sup> § 161. See 92 Ala. 146, 152 (a gift to her against his creditors); 36 W. Va. 11; 61 Conn. 465 (presumption repelled); 85 Me. 312; 149 Penn. St. 134.

The wife alone should insure the premises. 131 N. Y. 211. As to damages for injuries thereto, see 152 Mass. 7; 135 N. Y. 201.

<sup>5</sup> § 152; *Hutchins v. Colby*, 43 N. H. 159; *Yale v. Dederer*, 18 N. Y. 265; 21 Ind. 115.

her separate estate, acknowledged in conformity with the statute, and with the joinder of the husband, is a valid security and capable of enforcement; not alone where she had it mortgaged to secure her own or her husband's debt, but also, in a case free from fraud or undue influence, where it was mortgaged for the benefit of a third person.<sup>1</sup>

162. The wife's undoubted right to treat her husband as the trustee or agent of her separate property, has given rise, under the married women's acts, to perplexing questions as between herself and his creditors.<sup>2</sup> The husband's agency, whether created under suspicious circumstances or not, as regards the public, is, like other agencies, a matter of fact for legal ascertainment as to existence or scope upon all the proof.<sup>3</sup>

<sup>1</sup> § 274; 94 Penn. St. 255; 112 Penn. St. 284; 18 Fla. 761; 111 Ga. 889; 54 Conn. 2; 45 Ark. 147; 32 Fla. 481. Cf. 89 Ga. 306 (joint owner).

All persons taking such a mortgage are bound to ascertain that there has been no fraud on the wife in inducing the mortgage. 98 Penn. St. 561; *Marchand v. Griffon*, 140 U. S. 516. But see 89 Ga. 181. And see 181 Mass. 192.

As to the wife's mortgage to secure the purchase-money of land, see 58 N. H. 298; 38 Ohio St. 548. And see 27 Ind. App. 333 (for money borrowed by her). But in all such cases the wife's rights as surety are carefully guarded; and the husband cannot pervert the security to her detriment, nor bind her by his own agreement for extension or discharge, nor alone receive payment and satisfaction and discharge the mortgage, 51 Penn. St. 68. The creditor's agreement of defeasance accompanying the transaction, or covenants on his part, must be faithfully observed. *Lomax v. Smyth*, 50 Iowa, 223. As to other security her rights are the usual ones. *Wilcox v. Todd*, 64 Mo. 388. Future advances to the husband alone, under such mortgage to the creditor for security and his bond to reconvey upon payment of an existing debt, cannot be set up against the wife. 64 Vt. 616. And see 142 N. Y. 290. But the wife cannot question acts of her husband within scope of the transaction. 61 Vt. 69. In some States the wife is expressly forbidden, as we have seen, to become a surety in any manner. § 152; 152 Ind. 371.

<sup>2</sup> § 153. In some States her privilege in this respect is carried very far, to the detriment of her husband's creditors. See 33 N. Y. 518; 27 N. Y. 277; 71 N. Y. 199 (power of attorney given); 41 Kan. 236; 75 Ill. 446 (her collecting agent); 98 Ill. 38, 47 (her clerk or salesman); 139 Ill. 450; 101 U. S. 397; 56 Miss. 321; 29 Kan. 597; 54 Ga. 262. As to delegation of his authority by the husband, see 59 Tex. 240.

<sup>3</sup> As to presumption (upon which States differ), see 75 Ill. 446; 141 Ill.

163. With regard to the husband as managing agent, it seems to be the well-settled American doctrine that, by working upon the wife's lands, the husband acquires no beneficial interest therein which can be enforced in equity on behalf either of himself or his creditors, in absence of a definite agreement for compensation; unless, possibly, it could be shown to exceed in value the cost of supporting the whole family.<sup>1</sup> With the assent of the husband and father, the labor of the wife and children may be bestowed upon the separate property of the wife, and thus enure to their benefit. There is no known rule of law which requires the husband and father to compel his wife and children to work in the service of his creditors.<sup>2</sup> And a similar principle may be applied to a wife supported from her husband's property.<sup>3</sup>

226; 149 Penn. St. 228. Cf. 61 Mo. 578. And see 101 U. S. 397; 118 Mass. 74; 67 Iowa, 395; 39 S. C. 525. Proof of action as an occasional special agent does not prove his general agency; yet the rule of proof is not rigid. 156 Mass. 372; 131 Ill. 377; 151 Mass. 11; 80 Iowa, 246.

A power of attorney from wife to husband for conveyance or other real estate transactions is broadly upheld under some local statutes. 41 Kan. 236. But cf. 45 Minn. 515; 47 Minn. 491.

<sup>1</sup> Buckley v. Wells, 33 N. Y. 518; Webster v. Hildreth, 33 Vt. 457; Cheuvette v. Mason, 4 Greene (Iowa), 231; Betts v. Betts, 18 Ala. 787; Commonwealth v. Fletcher, 6 Bush, 171. The crops cannot be attached by his creditors. § 154; 6 Allen (Mass.), 565; 24 Cal. 98; 21 Ark. 316. Cf. as to crops severed, 150 Mass. 275. Nor the betterments, buildings, and rents. 32 Vt. 265; 42 Barb. (N. Y.) 310; 1 Head (Tenn.), 305; 15 B. Monr. (Ky.) 80. And see 50 Vt. 437. Presumptively, the rent, income, and profits of a wife's separate statutory land cannot be subjected by the husband's creditors to the payment of his debts even though he contributed labor to produce them. 27 Fla. 579; 56 Fed. (U. S.) 443; 112 N. C. 283. So as to ice gathered from the wife's farm by the husband as her agent. 34 W. Va. 128. See as to tenant under husband's lease, 61 Vt. 364. Investment of the rents, income, and profits of the wife's lands in her own name is ordinarily no fraud upon the husband's creditors. 86 Ala. 267; 76 N. W. 617.

<sup>2</sup> 1 McCart. (N. J.) 423; Hodges v. Cobb, 8 Rich. (S. C.) 50; 60 Iowa, 539; 55 Penn. St. 437; 23 Wis. 284; 99 Mass. 566; 34 N. Y. 293; 64 Ill. 238.

<sup>3</sup> 68 Penn. St. 421. See 50 Ill. 481.

Yet the husband's occupation and cultivation of his wife's lands with

164. Where the question arises, then, whether the husband is enjoying the wife's property by way of gift from her, or as her managing attorney, it must be determined by evidence, and in either case the advantage seems to be with husband and wife in all controversies with the creditor.<sup>1</sup>

165. A husband's misconduct as his wife's fiduciary is visited with the usual consequences.<sup>2</sup> Whether valuable creditors'

her assent may give him a certain valuable interest if he chooses to claim it. 37 Ill. 247; 16 Ohio St. 509. So, for his services as managing agent, under a contract for recompense, he or his creditors may set up a claim. 55 Ga. 406. See 55 Iowa, 650.

<sup>1</sup> § 155. The presumptions are not equally balanced in the different States. See 9 Mich. 45; 7 Bush (Ky.), 394; 75 Ill. 446; Aldridge v. Muirhead, 101 U. S. 397; 105 Penn. St. 405. Gifts of income would be more readily presumed than gifts of capital. Her title is generally open to inspection, and may be challenged for fraud. See § 155; 39 N. H. 196; 50 Penn. St. 382; 1 W. Va. 502; 19 Iowa, 491; 3 Bush (Ky.), 155; 114 Mass. 520. But it is fair to say that whenever she gives her property to him, without agreement for any repayment, but for investment in his business, and to afford him credit with the world, and he so invests it with her knowledge and acquiescence, or takes title to real estate in his own name, with her acquiescence, for a similar purpose, his *bona fide* creditors, who had relied upon this capital, ought not, especially when his time and energies were of essential value to it, and changes of material or investment are such as to render identification of the property as hers impossible, to suffer afterwards, because of her attempt to recall the gift when she finds him embarrassed; not even a special partner would have a right to do so. § 155; 28 Md. 210; 47 Ill. 22; 81 Iowa, 559; 50 Ind. 288; 54 Miss. 353; 53 Ala. 136; 26 N. J. Eq. 468; 105 Penn. St. 522; 81 Neb. 458. Cf. 36 Penn. St. 134.

The wife has no resulting trust in lands bought by her husband with her funds if he be regarded as her debtor therefor. 187 Penn. St. 252. See 75 Ill. App. 561; 113 Ga. 1143. An investment, by the husband, of the wife's separate means and property, in purchasing either real estate or personal property for her separate use, is valid, if the rights of creditors be not thereby impaired. Jackson v. Jackson, 91 U. S. 122. But cf. as to fraud upon his creditors, 114 Mass. 520; 66 Ala. 217; 102 Penn. St. 481; 107 Penn. St. 502. See also c. 14, *post*.

Lands paid for out of the wife's separate property cannot be reached by the husband's creditors. 62 Tex. 299; 63 Iowa, 620. See 62 Md. 458; 14 Lea (Tenn.), 209.

<sup>2</sup> § 156. A husband cannot, without authority, submit to arbitration on the boundary of the wife's land. Benedict v. Pearce, 53 Conn. 496. He cannot purchase land as her agent, and personally purchase the in-

rights are prejudiced by any duress, menace, or other misbehavior of the husband which procured them the wife's security, depends upon their instigation, knowledge, or consent.<sup>1</sup> When the husband makes a void transfer as his wife's trustee, she can follow the investment into other hands, or she may have him removed from his trusteeship for suitable cause.<sup>2</sup> Fraud, coercion, abuse of marital confidence can be alleged by the wife against an unworthy husband in support of her title, injuriously impaired by him.<sup>3</sup> On the whole, there is and

cumbrance upon it. 33 S. C. 325. See 66 Ala. 217; *Lochman v. Brobst*, 102 Penn. St. 481.

<sup>1</sup> § 155; 20 Iowa, 431; 10 Minn. 427; 50 Ala. 3; 84 Penn. St. 442; 76 Ill. 511; 45 Cal. 480; 63 Ga. 126; 52 Wis. 387; 70 Ind. 23; 107 Mo. 270; 58 Ind. 498. See 96 Ala. 353.

<sup>2</sup> 14 Cal. 658; 89 N. Y. 236; 35 Ala. 282. So with any other trustee of her separate property. 5 R. I. 72.

<sup>3</sup> 47 Cal. 183; 52 Ark. 253; 116 Ind. 164; 33 S. C. 325, 69 P. 96; 62 Mo. 300; 86 Penn. St. 512; 99 Mo. 407; 90 Ala. 546; 4 Met. (Ky.) 353. Promissory notes or stock taken in the husband's name are open to explanation; and evidence *aliunde* may show that they belonged to the wife's separate property. *Buck v. Gilson*, 37 Vt. 653; *Conrad v. Shomo*, 44 Penn. St. 193; *Baker v. Gregory*, 28 Ala. 544; *Fowler v. Rice*, 31 Ind. 258; 91 Ala. 198; 4 Met. (Ky.) 353. Subject, perhaps, to equities of *bona fide* third parties for consideration without actual or constructive notice of the trust, in strong instances, the wife's rights are protected in equity against her husband's misdealings with her fund. See 57 N. H. 184; 80 Penn. St. 391; 54 Miss. 359; 52 Ind. 434. The husband as a rule cannot transfer or incumber his wife's separate estate without her consent; yet the question recurs whether the law of agency should take here its usual scope. § 155; 133 Cal. 114. A husband duly authorized may render the wife liable on a note signed as her agent. 61 Wis. 660. The wife's authority given to the husband to sign her name as surety does not include authority to sign her name as principal maker. 61 N. H. 612. As to authority to make her a lessee, see *Sandford v. Pollock*, 105 N. Y. 450. He cannot indorse in her name without authority. 107 Mo. 270. And see 48 Mich. 531; 99 Mich. 534. But the wife may ratify her husband's unauthorized acts if she does so knowingly.

The husband, like any other agent, is liable to the party injured for his false and fraudulent statement in a transaction on his wife's behalf, and for tortious misconduct generally. See 69 P. 96.

Certain States following the English equity doctrine, avoid close inquiry into the husband's management of his wife's property, by limiting the time during which the husband's receipt of the rents, profits, or

must be, throughout this transition period, conflict in the authorities as to the effect of a husband's receiving the proceeds of his wife's share in inherited property, or of some sale or investment in her sole right: States which abide by the common law of coverture inclining to sustain his ancient right of reduction into possession, and presuming in his favor; and States, on the other hand, under the impress of the new legislative policy, reserving her title, unless she plainly and voluntarily divests herself of separate rights.<sup>1</sup>

**166. Appointing a married woman trustee** may be considered objectionable (apart from equity rules of constructive trust), while the law yet fails to divest her of all coverture disabilities, so as to make her both efficient and responsible in the legal sense. Yet it is held in some States that a married woman may, under the statutes, hold an estate in trust, and make contracts accordingly.<sup>2</sup>

**167. There is now little or no limit upon the wife's legal capacity to bind her statutory estate to the discharge of liabilities created on account thereof, in various States.**<sup>3</sup> Some of the latest acts explicitly confer upon married women the power to deal with their property and sue and be sued as though single. As a natural result of such innovations, while estoppel does not work against a married woman so readily as

income shall charge him, unless he expressly agrees otherwise. § 155; 52 Miss. 397 (one year); 102 N. C. 413. But see 85 Ga. 323. See also as to the wife's permissive conduct; 42 Wis. 548; 6 Rich. (S. C.) 216; 2 Tenn. Ch. 5. Such a rule appears desirable for preserving domestic peace and ensuring the husband's estate after death against dubious claims; for otherwise, apart from the wife's undue delay or her presumed assent, and after deducting his charge for services, the husband, where regarded as purely an agent, is obligated to account. Even admitting, however, the income his, the husband may show and execute an intention of preserving such income as his wife's separate property; or, on the other hand, of investing it rather for the benefit of the whole family.

<sup>1</sup> § 155; 81 Ill. 64; 75 Ill. 446; 82 Ill. 19; *Bristol v. Bristol*, 93 Ind. 281. See 143 Mass. 203; 30 Fed. (U. S.) 401; 65 Md. 245; 113 Penn. St. 209.

As to the husband's agency in his wife's trade, see § 168, *post*.

<sup>2</sup> § 166; 47 Me. 330.

<sup>3</sup> § 157. See 69 Ill. 214, as to her legal capacity by legal contracts in such matters.

against persons *sui juris*, it is now held, and justly, too, that where married women make agreements by fraudulent means, with reference to their separate property, and thus obtain inequitable advantages, a court of chancery will treat them as estopped from setting up and relying on their coverture to retain the advantage. The more the legal disabilities of the wife are stricken away, the closer does she approach the status of *sui juris*.<sup>1</sup>

168. In various States, a personal judgment may now be recovered against a married woman; though the former rule merely reached her separate property *in rem*.<sup>2</sup>

<sup>1</sup> § 157; 129 Mass. 554; 90 Ill. 174; 17 Fed. (U. S.) 760; 153 Penn. St. 646; 54 Md 222; 145 Penn. St. 628. Some codes now declare that a married woman may be bound by an estoppel like any other person. 108 Ind. 801. But cf. 80 N. H. 568.

Where land has been conveyed to the wife, and mortgaged back by her informally for the purchase price, the wife cannot retain the land and repudiate her consideration. 106 N. C. 512. "Her power to contract measures the extent to which she may become estopped." 48 Minn. 408; 13 Col. 229. And see 131 Ind. 267; 76 Iowa, 633. As to estopping her assertion of a vendor's lien, see 89 Ala. 414; 85 Mich. 63. Or of her dedication to public uses, see 92 Ky. 244; 101 Ind. 200. Or of her deed, see 41 Minn. 165. She is chargeable with her laches. 55 Ark. 85. As to an increased estoppel with increased rights *sui juris*, see 52 Fed. (U.S.) 627; 41 Minn. 165; 87 Tenn. 89. And see as to innocent holder of wife's note, 80 Wis. 605.

Wife's invalid transaction held voidable only. 79 Mich. 653; 88 Ga. 84; 50 Miss. 56; 134 Ind. 9; 116 Ind. 408 (not voidable by husband).

<sup>2</sup> § 158, and cases cited. Upon this point, the latest local code should be carefully consulted. The tendency now is to apply the rule of suing and being sued to married women as to others *sui juris*. Cf. *ante*, 142. For a conservative rule, see 8 Q. B. D. 177; 20 N. J. Eq. 109; 36 Ohio St. 79; 28 N. J. Eq. 107; 56 Vt. 727. But cf. 112 Mass. 515; 36 Ohio St. 79; 59 Ill. 515; 75 Ind. 98; 16 R. I. 495; 42 N. J. L. 442 (trustee attachment); 52 Mo. 297; *Wright v. Burrows*, 61 Vt. 390. Whenever a statute allows a married woman to sue alone, she must sue alone. 61 Vt. 390. And this rule applies often in the latest legislation as to her action for slander or other tort; she sues without joinder of her husband. 62 Vt. 243. For a judgment against her in tort, see *Burdick v. Burdick*, 16 R. I. 495. As to suits in contract at law by or against her with personal judgment, see 50 Ohio St. 417; 104 Mo. 44. As to confession of judgment, see 44 N. J. L. 94. She ought to defend, and not permit judg-



ment to be taken and then try to avoid the judgment. 92 Mich. 427; 132 Ind. 63. But cf. 144 Penn. St. 215. See, further, 131 N. Y. 350.

As to actions of replevin to recover the wife's property, see 60 Md. 426; 75 Ind. 98.

In the present state of the law, each practice code must afford its own rule.

## CHAPTER XII.

### THE WIFE'S PIN-MONEY, SEPARATE EARNINGS, AND POWER TO TRADE.

169. The wife's pin-money constitutes a feature of English marriage settlements in modern times. Pin-money may be defined as a certain provision for the wife's dress and pocket, to which there is annexed the duty of expending it in her "personal apparel, decoration, or ornament."<sup>1</sup> The popular name of this provision scarcely suggests its real significance; for, so far from being a petty allowance, it is often of the most liberal amount imaginable.<sup>2</sup>

170. The wife's apparel and ornaments suitable to her degree are known as *paraphernalia* and usually discussed with reference to a surviving widow's rights, inasmuch as the husband controlled them while marriage lasted. Modern legislation now affects the subject.<sup>3</sup>

<sup>1</sup> § 160; *Jodrell v. Jodrell*, 9 Beav. 45; *Howard v. Digby*, 2 Cl. & Fin. 654. As to the date of its first legal recognition, cf. 2 Cl. & Fin. 676; *Spectator*, 295. See *Peachey, Mar. Settl.* 300; *Sugd. Law Prop.* 165.

<sup>2</sup> In one reported English case, by no means recent, £13,000 a year was secured to the wife as her pin-money. See 2 Russ. 1. The subject of the wife's pin-money seems to have received little attention in this country. But see *Miller v. Williamson*, 5 Md. 219. And in England few cases of the sort have ever arisen. Decisions as to pin-money and separate estate are frequently confounded. See *Lord Brougham*, in 2 Cl. & Fin. 654; § 160.

<sup>3</sup> § 160. Some statutes now permit the wife to sue alone for loss or injury to such articles, — as, for instance, to her trunk of wearing apparel; and legislation often confers the ownership upon the wife as her separate property besides. But independently of statute and the husband's gift he should sue for injury. *Smith v. Abair*, 87 Mich. 62. And even though the wife's general property, he may sue by virtue of a bailee's or special interest. *Jacksonville R. v. Mitchell* (1894), Fla. See c. 16, *post*. A wife's letters are her own, and the husband has no right to open them. 64 Vt. 450; *Grigsby v. Breckenridge*, 2 Bush (Ky.), 480; L. R. 18 Eq. 511.

171. To savings out of her housekeeping allowance the wife was formerly supposed also to gain a title.<sup>1</sup> In all cases of this sort the husband's gift or permission, he not having deserted her, constitutes an important element of the wife's title. And the mere fact that a wife is in the use and enjoyment of clothing, or other personal property, is held insufficient in the absence of legislation to establish her right to a separate estate therein.<sup>2</sup> Such ownership on her part is asserted most strongly as against her husband's subsequent creditors, and where his gift of a housekeeping allowance or certain articles is the foundation of her separate investment.<sup>3</sup>

172. In general, as to the wife's earnings, the well-settled principle, both of law and equity, is that, in absence of a distinct gift from the husband, all the wife's earnings belong to him and not to herself, by virtue of his liability to support his family.<sup>4</sup> Independently, therefore, of statutes which

<sup>1</sup> § 161; Prec. in Ch. 44, 297; 3 P. Wms. 387; 15 Beav. 529; 33 Barb. (N. Y.) 264.

<sup>2</sup> *State v. Pitts*, 12 S. C. 180; *ante*, 88.

<sup>3</sup> *Carpenter v. Franklin*, 89 Tenn. 142.

<sup>4</sup> For the old common-law rule, see *ante*, 89. *Jones v. Reid*, 12 W. Va. 350; *Douglas v. Gausman*, 68 Ill. 170; *Kelly v. Drew*, 12 Allen (Mass.), 107; *Glaze v. Blake*, 56 Ala. 379; 157 Ind. 414. But by recent statutes, enacted in many of the United States, as also in England, married women are allowed the benefits of their own labor and services when performed, or even contracted to be performed, on their sole and separate account, free from all control or interference of a husband. § 162; 51 N. H. 172; 15 Gray (Mass.), 94; 57 Me. 586; 44 Ga. 541; 178 Mo. 145; 156 Penn. St. 337; 12 R. I. 267; 8 Oreg. 224; 10 Kan. 298; 89 Ind. 246; 65 Ill. 469; 31 Conn. 596; 52 Conn. 327. For English rule, see L. R. 4 C. P. D. 7; Acts 45 & 46 Vict. c. 75. See 28 Wash. 170 (community property). These statutes vary somewhat in their terms. The amount the wife may thus acquire is in certain States limited to a specific sum, and statutes sometimes discriminate so as to protect simply her earnings derived from labor for another than her husband. Suits for the wife's wages may, under many late codes, be maintained by the wife alone. 74 Ind. 82; 50 Mich. 77; 101 Penn. St. 181. And see 67 Iowa, 505 (tort).

The presumptions here concerning the wife's title to her earnings seem to be much the same as in other separate property purporting to belong to her. 20 Penn. St. 308; 17 Wis. 591; 17 Iowa, 510. Questions of iden-

plainly secure to married women their separate earnings under the circumstances, it is held that an agreement between the wife, with the knowledge and consent of her husband, and a third person, for nursing or boarding, and attention, gives to the wife no title as against her husband,<sup>1</sup> nor a right to maintain her separate action;<sup>2</sup> for it is he alone who sues for such services at the common law.<sup>3</sup> On general

tity, too, in tracing an investment of earnings, are applicable, as in other cases of separate property. There is, however, apparently less favor shown by our courts to the legislative grant of separate earnings, than to that of acquisitions to a wife's separate use from other sources; and still less, as we shall soon see, to statutes extending the wife's right of acquiring earnings to a permission to embark in business on her own account. The presumption is said to be that a wife's services, rendered even to her own mother or to some one in the household, on a basis of compensation, were given on the husband's behalf or that she elected to have it so. 36 Conn. 175; 88 Mich. 91; 77 N. Y. S. 364. The wife must show that she rendered the service on her own account, and not conjointly with the husband or for his benefit; and his waiver of his own claims should also appear on her behalf. 65 Md. 474; 50 Iowa, 135. And where the proceeds of her earnings have been so mixed up with her husband's property as not to be easily distinguishable, the disposition is to regard the whole as belonging to the husband. 3 C. E. Green (N. J.), 472; 103 Mass. 300. The idea, moreover, is not favored, of permitting a wife to forsake the matrimonial domicile, or neglect her household duties, without her husband's consent, for the purpose of acquiring earnings for her separate use, especially if her husband be still legally bound to support her by his own labor. 68 Ill. 170; *Mitchell v. Seitz*, 94 U. S. 580. But see *L. R.* 10 C. P. 554. It may be added that, in general, statutes which authorize married women to hold property acquired by gift, grant, or purchase, from any person other than the husband, do not carry the wife's earnings by implication. 33 Barb. (N. Y.) 264; 54 Fed. (U. S.) 295; 46 N. H. 45; 37 Me. 394; 11 Mich. 470; 91 Ga. 813; 27 Ind. 490; 36 Ill. 280.

<sup>1</sup> 42 Barb. (N. Y.) 66. And this, even though the husband makes of his house a sort of hospital, and his wife assists him. 64 N. Y. 589. And see 17 Wis. 591; 15 Iowa, 501; 8 Gray (Mass.), 177. Nursing or doing washing for a boarder in the house or taking a boarder, gives the right of action to husband presumably rather than to wife. *Barnes v. Moore*, 86 Mich. 585; *Poffenberger v. Poffenberger*, 72 Md. 321. And especially where the husband defrayed all the household expenses and purchased the supplies. *Bloodgood v. Meissner*, 84 Wis. 452.

<sup>2</sup> *Ib.*; 6 Thomp. & C. (N. Y.) 484. And see *Skillman v. Skillman*, 15 N. J. Ch. 478; 112 Ga. 842.

<sup>3</sup> *Porter v. Dunn*, 131 N. Y. 814; 130 N. Y. 497; *ante*, 88. Damages

principles of equity, however, not to add of marital legislation, the husband may create in his wife a separate estate in the proceeds of her own toil; the validity of such a gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances.<sup>1</sup>

173. The wife's power to carry on a separate trade is another topic known long ago to the law of England; and in this respect our legislation of the present day seems to have been somewhat anticipated. This power, like most of her other separate privileges, is founded at the common law upon marital contracts made with her in derogation of the husband's usual rights. It appears that a wife desiring to go into business on her own account, makes an agreement with her husband. When the agreement is made before marriage, it will bind the husband and his creditors; when made during the coverture, it binds the husband only, and is void against his creditors.<sup>2</sup> Separate trading was also permitted the wife

for negligently diminishing the wife's earning capacity belong presumably to the husband as one entitled to the fruits of the wife's labor. *Uransky v. Dry Dock R.*, 118 N. Y. 304. So it is where the wife sues now for tort in damages. 130 N. Y. 497. And see 58 Fed. (U. S.) 531.

See as to investment of wife's wages, 81 Ala. 489, 549; 105 Penn. St. 522; 74 Ala. 446 (a mingled fund).

<sup>1</sup> 3 Edw. Ch. (N. Y.) 92; 34 N. J. Eq. 124; *Richardson v. Merrill*, 32 Vt. 27; *Jones v. Reid*, 12 W. Va. 350; 56 Ala. 379. See also *Postnuptial Settlements*, c. 14. A wife can hire out, with her husband's consent, and can sue for, recover, and keep her earnings. *Benson v. Morgan*, 50 Mich. 77; *Wren v. Wren*, 100 Cal. 276. The validity of a husband's gift is best upheld against his subsequent creditors. *Bowman v. Ash*, 143 Ill. 649.

Simply permitting his wife knowingly to receive and retain her earnings and to loan, deposit, and invest them for her own benefit and in her own name, is sufficient as against the husband's creditors. *Carpenter v. Franklin*, 89 Tenn. 142; *Grantham v. Grantham*, 34 S. C. 504; *Potter v. Potter*, 64 Vt. 298. Such a gift on his part, once made, the husband cannot annul by a subsequent investment of the proceeds in his own name. *Rivers v. Carleton*, 50 Ala. 40; 12 Rich. (S. C.) 308; 43 Mich. 407. Wife's earnings are sometimes bestowed on her by statute, where the husband deserts. § 163. And see 86 Ala. 168 (separation).

<sup>2</sup> 163; 3 Burr. 1783; 2 Roper, *Hus. & Wife*, 165, 175. See *Antenuptial and Postnuptial Settlements*, cs. 13, 14. The husband will be liable

by the "custom of London."<sup>1</sup> Notwithstanding the law in this respect, it does not appear that separate trading in England, prior to the innovations introduced with the married women's acts, was ever very common.<sup>2</sup>

174. The wife's power to trade comes up anew with our recent policy in favor of the independence of married women. And the rule seems, apart from late legislation, to be well established in the United States, that the husband may, in pursuance of a marriage contract, antenuptial or postnuptial, confer upon his wife the right to trade for her exclusive benefit.<sup>3</sup>

for the debts, if it appeared that he participated with the wife in the benefits.

<sup>1</sup> 3 T. R. 618; *Barlow v. Bishop*, 1 East, 482; 2 Car. & P. 38. Herein she was regarded as liable to arrest and imprisonment for debt without her husband, and, moreover, might be declared a bankrupt. 2 B. & P. 97. See 2 Roper, *Hus. & Wife*, 124; and if the husband had any concern in the business, the wife was not to be treated as a *feme sole* in respect of it. 3 Burr. 1776.

<sup>2</sup> See 175, *post*. The difficulties in the way of establishing credit, and of negotiating securities, on the wife's sole behalf, were probably found insurmountable, even though married women might be found anxious to assume the responsibilities of trade, with its incidental imprisonment for debt. The judicial evidence of this separate trading is supplied chiefly by the misfortunes such trade entailed upon the women who embarked in it. § 163. See *Johnson v. Gallagher*, 3 De G. F. & J. 494 (reluctance of equity even where husband and wife lived apart).

<sup>3</sup> § 164; 43 Barb. (N. Y.) 530; *Wilthaus v. Ludicus*, 5 Rich. (S. C.) 326; *Uhrig v. Horstman*, 8 Bush (Ky.), 172; *Cowan v. Mann*, 3 Lea (Tenn.), 229. Nor have formal contracts for this purpose between husband and wife been always insisted upon, but the question is regarded as one of mutual and *bona fide* intention merely. 32 Vt. 27; *Partridge v. Stocker*, 36 Vt. 108; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Tillman v. Shackleton*, 15 Mich. 447; *Wieman v. Anderson*, 42 Penn. St. 311; *Todd v. Lee*, 16 Wis. 480; 15 Ind. 254. The husband's assent is in general necessary, provided they live together; and if they do not, different considerations apply. 30 Barb. 47; *Green v. Pallas*, 1 Beas. (N. J.) 267. And apart from statute, it would appear to be the general rule that, unless the husband's consent that the wife carry on business in her own name is based upon a sufficient consideration, he may withdraw it at any time and assert his common-law rights. *Conklin v. Doull*, 67 Ill. 355; 16 Wis. 480; 32 Vt. 27; 36 Vt. 108; 17 Gratt. (Va.) 503; *King v. Thompson*, 87 Penn. St. 365. Some old statutes recognizing the wife as a *feme sole* trader appear to have existed in Pennsylvania and South Carolina. *Schouler, Hus. & Wife*, § 305.

175. The combined influence of legislative and modern equity decisions affects the whole doctrine at the present day. The English legislation of 1870 and 1882 is liberal and liberally applied.<sup>1</sup> The recent married women's acts in many of the United States have also enlarged and more fully established the wife's power to trade or exercise a profession on her own account; and the profits of her business are thus secured to her sole and separate use. She is thus enabled to use her separate property; and she may even enter, in some States, into a general partnership for trade.<sup>2</sup> In general, what the

Equity jurisdiction to grant the privilege not favored. 75 Ala. 293. And see 61 Ala. 251; 4 Jones Eq. (N. C.) 1.

The conclusion to be drawn from this class of cases is that, modern policy having once conferred upon the wife large powers both as to the acquisition and enjoyment of separate property, as well as the right to invest and reinvest the same, including their rights under marriage settlements, married women naturally sought business opportunities with their capital; and thus the modern courts, confronted with the practical results, and aided by precedents from old local customs or old legislation, were drawn into the practical concession of trading privileges, and hence of trading liabilities, while professing to deny to the wife on general principles the right to engage in mercantile pursuits without more explicit statute provisions to that effect, and while requiring the assent of the husband to appear. § 165. Independently of statute the wife may purchase goods on her separate credit with her husband's assent, and use them in a sense for a business investment on her part. 150 Mass. 82; 86 Ala. 424. When it is clearly for the wife's advantage to reap the benefits of her business, the disposition of the law to yield them must be strong; but where, as must often be the case, she speculates imprudently and becomes deeply involved, the court is perplexed, though doubtless anxious to relieve her. § 165. See 3 De G. F. & J. 494; 31 Ind. 116; 36 Vt. 108; 67 Ill. 355. As to preserving capital rather than profits for the wife, see 65 Ill. 469; 37 Ind. 349; 25 N. J. Eq. 45.

<sup>1</sup> Acts 33 & 34 Vict. c. 93; 45 & 46 Vict. c. 75; see L. R. 4 C. P. D. 7; *Ashworth v. Outram*, L. R. 5 Ch. 923 (wife's valuable business preserved to her). As to selling out the good-will, see *Peacock's Trusts*, L. R. 10 Ch. D. 490. And see *Gilchrist, ex parte*, 17 Q. B. D. 521; L. R. 3 Ch. 622.

The later act of 1882 explicitly secures to the wife as her separate property, her wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

<sup>2</sup> § 166. Such local statutes speak of "free trader," "sole trader,"

wife acquires under these statutes is declared to be exempt from liability for the husband's debts, and not subject to his control or interference.<sup>1</sup>

176. Under such statutes permissive of the wife's separate trade or occupation it is a general rule that the wife's contracts regarding her separate trade or business are binding on her separate property, and that the husband is not answerable for her solvency. With reference thereto she may make contracts, and sue and be sued, as if sole, except (as such statutes

"free dealer," "public merchant," &c., with details. Stimson's Am. Stat. Law, art. 652. To the status of free trader (which often applies to wives abandoned by their husbands), peculiar rights and liabilities sometimes attach under these codes. See 101 Penn. St. 371; 96 Penn. St. 180; 78 Mo. 320; *post*, § 219; 79 Ky. 497. But plenary power to become accommodation indorser is not implied under such statutes. 86 Ga. 780. And see 52 Ark. 234. A married woman may now in many States incur a stockholder's liability with reference to shares she may own, or enter into a building association. See 103 Penn. St. 86.

Registry provisions are found in this connection. Such statutes must not be too technically construed, so as to defeat her usual right to acquire separate property. 150 Mass. 82. An Alabama statute requires the husband's written consent to the wife's power to trade. 98 Ala. 475. See also 106 Mass. 471; 8 Bush (Ky.), 172 (authority from court).

<sup>1</sup> A statute which is designed to secure to the wife her separate earnings does not make her a *feme sole* trader. 101 Penn. St. 181.

The wife, under such statutes, is found engaged on her separate account, as milliner and dressmaker. 65 Ill. 469; 46 Mo. 38. Farmer. 51 Wis. 204; 126 Mass. 332; 79 Ky. 497; 52 Ark. 234. Boarding-house keeper. 126 Mass. 411; 125 Mass. 421; 80 Iowa, 714. Army sutler. 24 Ohio St. 87. Operator of a mill. 49 Ind. 393. Saloon-keeper. 74 Ill. 306. Tavern-keeper. 74 Penn. St. 448. Or in whatever other business she may choose to carry on with her own capital. Even though the trade be unsuitable to her sex, fraud upon the husband's creditors will not be conclusively presumed. 7 Cal. 455. But it is held that the business under such statutes should be pursued as a continuing and substantial employment. 40 Conn. 117. As to the wife's more purely professional earnings, the very publicity of such a pursuit and its definite acquisitions, as against the humbler incidentals of household routine, on the one hand, or the mercantile employment of capital, on the other, favor a judicial resort to the actual marital understanding, so as to do the wife justice. *Belford v. Scribner*, 144 U. S. 488 (an authoress who took out copyright in her name and received regularly her royalties from the publisher). See also as to wife's earnings, *ante*, 172.



often run) that where she is sued the remedy is to be enforced against her separate property only, and not against her person.<sup>1</sup>

177. Under such legislation the husband is not liable on the wife's contracts and liabilities incurred in the pursuit of her separate business, unless he participates in it.<sup>2</sup> And what she invests in from the profits of her trade is her own if she keeps it duly apart as separate property.<sup>3</sup> But his participation will not unfrequently be found in the modern cases; and hence arises legal uncertainty, and often a suspicion of fraudulent arrangements against one another's creditors. The question arises, then, whether the proof shows that the wife carried on no separate trade, but was her husband's agent; or that she traded separately, and the husband was her agent; or that they were in open or secret partnership together.<sup>4</sup>

<sup>1</sup> § 167. She may make contracts of sale, and sue for goods sold and delivered to her customers. 43 Cal. 105; 52 Miss. 168; 80 Ark. 727. The contracts of married women, made by virtue of such statute capacity, should not be viewed with hesitation or suspicion by the courts, but should be fully enforced. 52 Miss. 168; 88 Ind. 283. The wife cannot allege her own fraud to defeat her business indebtedness. 65 Vt. 566.

The power to do business implies, too, the power to purchase goods, fixtures, and stock for it, and execute the needful instruments of purchase; and hence the wife's contracts for such purchase on credit, her notes, bills, securities, or simple indebtedness therefor, must be deemed obligatory and enforceable against her separate property by suit or otherwise. 74 Ill. 306; 51 Wis. 204; 1 Beas. (N. J.) 221; 31 Cal. 104; 91 Ind. 586; 54 Vt. 384; 18 Fla. 707. And what she thus purchases is to be held and treated as her sole and separate property as against her husband and his creditors. 13 Kan. 438; 46 Wis. 655; 35 N. Y. 647; 74 Penn. St. 448; 47 Wis. 113. So, too, as to her separate bank accounts, with reference to such business. 71 N. Y. 199. What she borrows by way of capital to commence the business, she is required to refund. 53 N. Y. 442; 75 Ala. 306; 43 Ark. 212; 47 Wis. 113; 51 Wis. 204.

On general principles, equity will enjoin a married woman who sells out a business and its good-will, which she has carried on for her separate account, from violating her own agreement with the purchaser in restraint of future competition or interference. 36 Ohio St. 517. And see L. R. 10 Ch. D. 490. But cf. 44 Kan. 268.

<sup>2</sup> *Parker v. Simonds*, 1 Allen (Mass.), 258; 39 Me. 119; 80 Ark. 727; 46 Mo. 38.

<sup>3</sup> *Hoag v. Martin*, 80 Iowa, 714; 38 W. Va. 478.

<sup>4</sup> § 168. Statute requirements of registry, etc., serve for precaution

**178. Where a married woman manages by agents, in her separate trade or business, the general doctrine of agency must**

here. For the wife's sole business purchases and sales the husband should not be held liable, as a rule. 39 Me. 119; 1 Allen (Mass.), 258. As to husband's liability on a lease, though professing to underlet for a wife's business, see 99 Mass. 562. But where the purchases and sales are made with the husband's knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, it may be inferred in general that the transactions were upon the husband's credit. 39 Me. 125. Where the separate business, however, is carried on against the husband's consent and without his concurrence, he assuredly is not liable, as a general rule. 46 Mo. 88; 87 Ind. 349. See 86 Conn. 107.

The husband as his wife's managing agent appears to confuse in this connection. 33 N. Y. 518. And cf. 24 N. Y. 881; 44 N. Y. 343; 46 N. Y. 318. See 128 N. Y. 568, where the wife employed her husband on a salary, and agreed with him to support the family, and, upon failure of her business, made a preferred claim of his unpaid salary; 40 N. J. Eq. 436; 67 Miss. 71. All purchases or contracts of purchase for commencing or prosecuting the wife's separate business must have been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors. 47 Wis. 113. The wife may employ her husband as her farmer. 47 Wis. 113. Or as her clerk. 28 Minn. 469; 98 Ill. 38; 19 Fla. 175; 139 Ill. 450; 67 Miss. 71. Or as her salesman. 6 Mo. App. 157. Or as operative or overseer in her mill. 49 Ind. 393. And see 85 Wis. 382; 37 W. Va. 242; 124 Penn. St. 311. In short, he may be her employed manager and give his time, labor, and skill to her business, without affording his creditors any right to business profits. § 168.

But transactions which are tainted with fraud upon the rights of creditors and others should not be permitted to stand. Capital placed by a wife in her husband's hands and by him so embarked in business with her assent that credit is obtained upon it, is not, with the increase, the wife's separate property as against his creditors who have trusted accordingly, but rather his property. 67 Ill. 164; 51 Wis. 204. Or possibly like that of a firm in which both were partners. See § 169. So as to a fraudulent blind upon the creditors of an insolvent. 81 Iowa, 303; 91 Ky. 294. A change in the mutual relations of the spouses regarding the business ought, on the usual principles of both agency and partnership, to be brought home to the knowledge of creditors with whom business relations continue uninterrupted. *Bodine v. Killeen*, 53 N. Y. 93.

Where the husband publicly carries on the business in his own name and purchases as proprietor, creditors must hold him liable, and not the wife, unless they can overcome the presumptions. 114 N. Y. 405 (hotel business carried on upon premises belonging to the wife and occupied by

apply. The wife cannot avoid the usual liabilities on the plea that she made her husband her agent.<sup>1</sup> The scope of the agency, too, must be considered as in other cases; and the agency, as actually conferred, is not the full test of responsibility for the agent's dealings with third parties; for those clothed with apparent authority may bind their principals as though really authorized.<sup>2</sup> In short, married women, to the extent and in the matters of business in which they are by law permitted to engage, owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. To the extent, therefore, of their enlarged capacity to transact business as conferred by statute, they may be estopped by their acts and declarations, and made subject to all the presumptions which the law indulges against the other sex.<sup>3</sup>

179. As to all agencies and all partnerships, one rule may apply in adjusting rights as between themselves, and another as to creditors whose confidence has been invited. And, on

both). But where he holds out to the world that it is his wife's business and not his, and the wife knows and approves of this, the latter is liable for his acts as her agent, while the agent himself is not. 64 Vt. 49.

<sup>1</sup> § 168; 43 Cal. 105. A husband as agent may thus in due course bind his wife's separate property by a note duly given and made out, or by other contract. 23 W. Va. 286; 54 Vt. 384; 18 Hun (N. Y.), 344; 117 Mass. 86. But cf. 55 Miss. 555; 130 Mass. 247. As to husband's concealment of an agency which actually existed, see 91 Ga. 39.

<sup>2</sup> 53 N. Y. 93; 78 Ala. 372.

<sup>3</sup> *Bodine v. Killeen*, 53 N. Y. 93; 43 Mich. 529; 34 Mich. 418. While, in general, the husband's gift may sustain the wife's claim of profits accruing from her separate trade; yet the better opinion is, upon either equity or statute consideration, that a business carried on by a husband and wife in full co-operation, his labor and skill uniting with hers, and not upon any real agreement of a mere agency on his part, must be considered as his business so far as his creditors are concerned, and fail accordingly of protection for her especial benefit. See 5 C. E. Green (N. J.), 13; 39 Me. 125; *Cramer v. Reford*, 2 C. E. Green (N. J.), 383. But see 17 Gratt. (Va.) 503; 75 Va. 390; 86 Ind. 286; 36 Vt. 108; *ante*, 177. A dormant partnership might in some such instances be suggested. See next section. Separate property of the husband which the wife uses in carrying on her separate business is liable to his creditors for his own debts. 64 Cal. 426.

the whole, it would still appear to be the general rule, notwithstanding the late statutes, that a wife may not, as against the world, become her husband's partner, nor even join her labor and capital to his in one and the same business enterprise.<sup>1</sup> By the wife's business copartnership with third persons, and particularly with those of the opposite sex apart from her husband, she entangles her separate property disadvantageously, and incurs the risk of personal affiliations, besides, quite perilous to domestic concord and the mutual confidence which marriage demands.<sup>2</sup> Where a married woman enters legally into a copartnership, she becomes personally liable, to the extent of her separate property, for the partnership debts, like any other partner.<sup>3</sup>

180. By the Civil Code of France, the wife may carry on a

<sup>1</sup> § 169. In some States the wife while permitted to form a copartnership with others cannot do so with her own husband. 3 Allen (Mass.), 127, 315; 7 Allen, 481; 55 Ill. 352; 31 Ind. 113; 91 Ind. 384; 83 Wis. 573; 56 Ark. 294. But the codes of some other States are clearly permissive. *Suav v. Caffé*, 122 N. Y. 308. See 31 Cal. 104; 37 Miss. 635; 30 Ga. 386; 60 Miss. 238.

A woman who lends money to a partnership of which her husband is a member cannot recover it back in law or equity. *Fowle v. Torrey*, 135 Mass. 87.

<sup>2</sup> § 169. The Massachusetts legislature permitted a married woman to form a copartnership in business with third parties, though not with her husband; but, after some ten years' experience, repealed, in 1874, that permission. 118 Mass. 495. And see 140 Mass. 521. Many other States deny her such a right as separate and exclusive of her husband's interest while she lives with him. 44 Tex. 381; 61 Tex. 437; 20 W. Va. 571; 41 Md. 19; 52 Miss. 239; 35 W. Va. 186; 82 Tex. 130. But in some parts of the Union such copartnerships are sanctioned. See 52 Miss. 402; 87 Mo. 282; 121 Ind. 323; 94 Mich. 230. See as to succession in a firm where one spouse dies, 49 Iowa, 41; 61 N. Y. 512; 24 Ohio St. 87; 87 Mich. 278 (husband's agency in her partnership).

<sup>3</sup> 122 N. Y. 308; 49 Iowa, 41; 52 Miss. 402; 125 Penn. St. 394; 94 Mich. 230. But many of our latest decisions tend to protect the wife against copartnership liabilities. See 24 Ohio St. 87; 43 Mich. 529; 20 W. Va. 571; 61 N. Y. 512; 13 Lea (Tenn.), 695. If husband and wife cannot be copartners in trade, all the property employed must be regarded as the husband's, and all the liabilities as his sole liabilities. *Fuller v. McHenry*, 83 Wis. 573. See further, § 169; 65 Vt. 575.

trade independently of her husband ;<sup>1</sup> and a similar right is recognized by the laws of Spain and other European countries.<sup>2</sup> From the civil, rather than the common law, are derived those property rights of married women which are recognized in Louisiana, California, and others of the Southwestern States, originally colonized by the Spanish and French.<sup>3</sup>

181. How great finally the change which modern equity and legislation have wrought, and modern legislation especially, in marital rights and duties as defined by the common law, will further appear when one examines his own local code and the local decisions thereunder.<sup>4</sup>

<sup>1</sup> Code Civil, art. 220 ; 1 Burge, Col. & For. Laws, 219. So the wife may be a separate trader under the custom of Paris. 1 Burge, Col. & For. Laws, 218.

<sup>2</sup> *Ib.* 226, 420, 698.

<sup>3</sup> § 170. Thus the Louisiana Code recognizes the capacity of the wife to carry on separate trade, or, as it is said, to constitute herself a public merchant, provided she act *bona fide* and have an active agency in the concern. La. Code, art. 128 ; 16 La. Ann. 50. And see 29 Cal. 564 ; 81 Cal. 104 ; Community Doctrine, *ante*, 7.

<sup>4</sup> These changes, which concern contracts, torts, property of the wife, and suits by or against her, may be specified as chiefly relating : (1) to the wife's antenuptial debts ; (2) to the wife's general disability to contract ; (3) to the necessities of wife and family ; (4) to torts committed by the wife ; (5) to torts committed upon the wife ; (6) to torts or crimes committed by one spouse and affecting the other ; (7) to the wife's property ; (8) to actions by or against a married woman, her arbitration, &c. Many codes in these respects completely reverse the old rule of the common law. § 170 note ; Schouler, *Hus. and Wife*, §§ 821-833 and appendix.

To attempt a minute analysis of the married women's acts would require more space than our plan will permit. Nor would it profit the reader. The independent legislation of some forty distinct communities, without uniformity of plan or principle, involving, as it does, the most interesting and yet the most perplexing of social problems, must necessarily produce results which cannot be reconciled. It is too early yet to generalize from the decisions. Even though the hand of innovation should be stayed for a while, and public attention centre in the work of blending these results into harmony, it would be many years before our courts, applying local codes and the traditions of the English common law and equity jurisprudence to the discordant mass of material before them, could hope to set up a consistent and thorough American system. See Bell, C. J., in 42 N. H. 381. The ultimate scope of all this legisla-

tion, must, however, be either, regarding the wife as peculiarly exposed to coercion and subtle influence or even mastery by main force, from the natural necessities of her position in the conjugal relation, if not the weakness of her sex, to afford that legal protection and shelter which she has always claimed, and which our law in a strait could never deny her; or else, as though no such necessities exist in a state of nature, but her disabilities have been rather created by municipal law, and enforced by tyrannical men, to treat her as *sui juris*, and make her bear the full responsibility of her own legal engagements, be they prudent or foolish, like one discoverd.

## CHAPTER XIII.

### ANTENUPTIAL SETTLEMENTS.

182. Settlements are a useful contrivance for preserving estates intact in a family. As between husband and wife the word "settlement" is applied to their mutual contracts in reference to the property of one another, by means of which, under the protection of courts of equity (which favor, as did also the civil law, arrangements recognizing property in the wife as well as the husband), they change and control the general rules of the marriage state. They cannot vary the terms of the conjugal relation itself; they cannot add to or take from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other, if they choose to enter into special stipulations for that purpose. These special stipulations may be either antenuptial or postnuptial; while, as we shall soon perceive, the two classes are more alike in name than substance, and the term "marriage settlements" is frequently applied to antenuptial settlements only.<sup>1</sup>

183. A distinction meets us at the outset between promises to marry and promises in consideration of marriage, as to applying the statute of frauds. A mere promise to marry may be verbal and yet binding, while all promises and agreements in consideration of marriage (such as we are now to consider) must be expressed in writing and signed.<sup>2</sup> At all events, a

<sup>1</sup> § 171. The usual effect of such settlements is to create in the wife a separate equitable (not statutory) estate. *Hamaker v. Hamaker*, 88 Ala. 267.

<sup>2</sup> §§ 172, 179. Statute of Frauds, § 4; *Lloyd v. Fulton*, 91 U. S. 479;

promise to marry, whether verbal or written, affords a singular remedy for breach, one quite different from the remedies attending marriage settlements; namely, no right of specific performance, but always damages to the injured party.<sup>1</sup>

184. The marriage affords a sufficient consideration in antenuptial marriage settlements, or what are called "marriage settlements." Hence a man cannot set aside an agreement in contemplation of marriage, on the plea that his wife's fortune fell short of his expectations.<sup>2</sup> It is the consideration of marriage, not the consideration of a corresponding fortune, which runs through the whole settlement or agreement, and supports every part of it, thus making marriage not only a high, but the highest consideration in fact known to the law.<sup>3</sup> In this country the validity of marriage settlements is generally recognized; and it is well understood that almost any *bona fide* and reasonable agreement, made before marriage, to

*Coles v. Trecothick*, 9 Ves. 250; *Flenner v. Flenner*, 29 Ind. 569; *Henry v. Henry*, 27 Ohio St. 121; 104 Mo. 1. Unsigned marriage agreements have sometimes been established by subsequent writings. See § 179; 12 Cl. & Fin. 45; 15 Beav. 349. Cf. *White v. Bigelow*, 154 Mass. 593. In order to affect the fee simple of an intended wife's lands with a trust for her separate use, an antenuptial agreement must be in writing and signed by both the persons who contemplate marrying one another. *Dye v. Dye*, 13 Q. B. D. 147. But a contract orally made and fully executed between parties to a marriage, whereby the wife's land was to be conveyed to the husband in consideration of support, etc., is held binding in *Larsen v. Johnson*, 78 Wis. 300. Cf. *Rogers v. Wolfe*, 104 Mo. 1; § 179, *post*.

<sup>1</sup> Public policy may establish such a distinction; with perhaps the added fact that the terms of a mere promise to marry are very simple.

But an oral contract in consideration of marriage might be sometimes objectionable under that other section of the Statute of Frauds which requires contracts not performable within a year to be expressed in writing. *Deshon v. Woods*, 148 Mass. 132.

<sup>2</sup> 1 Atk. 159, *per* Lord Hardwicke. But see *post*, § 181.

<sup>3</sup> § 173; 15 Beav. 499; 6 Ves. 752; *Magniac v. Thompson*, 7 Pet. (U. S.) 348. Where the intended husband contracted in writing to leave a certain house for life to the intended wife, and after marriage, he deeded the house to a third party, an immediate right of action accrues to the wife for his breach. *Synge v. Synge*, (1894) 1 Q. B. 466.



secure the wife either in the enjoyment of her own property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in chancery.<sup>1</sup>

185. But this rule must be taken with limitations. The marriage consideration supports every provision with regard to the husband, the wife, and the issue.<sup>2</sup> The consideration is held also to extend to stepchildren by a former marriage.<sup>3</sup> It does not, however, always extend to collaterals;<sup>4</sup> nor are covenants in favor of strangers supported by the marriage consideration unless specially provided for.<sup>5</sup> The consideration of marriage will support a reasonable settlement against a settlor's creditors, even prior ones;<sup>6</sup> and so, too, where the party to be benefited thereby was implicated in no fraud upon

<sup>1</sup> *English v. Foxall*, 2 Pet. (U. S.) 595; 2 *Wheat.* (U. S.) 32; *Tarbell v. Tarbell*, 10 Allen (Mass.), 278; *Skillman v. Skillman*, 2 Beas. (N. J.) 403; 29 Ga. 758; 5 Md. 66; 3 Cal. 83; *Smith v. Chappell*, 31 Conn. 589; cases *post*.

An estate may be limited to an unmarried woman's separate use, even where no particular marriage is contemplated. *Haymond v. Jones*, 33 Gratt. (Va.) 317. "These marriage settlements," observes Chancellor Kent, "are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created." 2 Kent, Com. 165.

<sup>2</sup> § 174. As for the marriage itself, a broad permission applies. 29 Gratt. (Va.) 628 (parties formerly in loose cohabitation); L. R. 16 Eq. 275. But a settlement in contemplation of a void marriage must fail. *Phillips v. Probyn*, (1899) 1 Ch. 811.

<sup>3</sup> 26 Md. 239; *Gale v. Gale*, 6 Ch. D. 144; *Vason v. Bell*, 53 Ga. 516. But see *Price v. Jenkins*, 4 Ch. D. 483. Cf. 39 Ga. 648, with L. R. 9 Eq. 44 (children of a future marriage).

<sup>4</sup> 10 Hare, 133; 15 Beav. 505; 13 Sim. 506; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Paul v. Paul*, 20 Ch. D. 742. Cf. 9 How. (U. S.) 196; 13 How. 268.

<sup>5</sup> *Sutton v. Chetwynd*, 3 Mer. 249.

<sup>6</sup> 17 Ves. 272; 1 De G. M. & G. 446; *Riley, Ch.* (S. C.) 271; *Jones's Appeal*, 62 Penn. St. 324; *Brunnel v. Witherow*, 29 Ind. 123; 1 Del. Ch. 187; *Credle v. Carrawan*, 44 N. C. 422.

the other's creditors, even though that provision be unreasonably large.<sup>1</sup>

186. If an agreement be made in writing before marriage, for the settlement of an estate, the settlement, although made after marriage, will be deemed valuable.<sup>2</sup> This is a well-settled rule, and should be constantly borne in mind. Very informal agreements are often sustained, rather on liberal than technical construction, the court taking into consideration the fact that marriage had taken place, or other acts been performed, on the strength of the promise; and the disposition of our equity courts is favorable to settlements after marriage in pursuance of some informal prior agreement, particularly as relates to personal property and as between the spouses themselves.<sup>3</sup>

187. With respect to the form of marriage settlements it may

<sup>1</sup> § 174. See *Herring v. Wickham*, 29 Gratt. (Va.) 628 (an extreme case); *Prewitt v. Wilson*, 103 U. S. 22. See also 6 Ch. D. 29; *Exchange Bank v. Watson*, 13 R. I. 91; *Sanders v. Miller*, 79 Ky. 517. But where the celebration of marriage was part of a scheme between the marrying parties to defraud and delay creditors, such settlement will not be allowed to protect the property against just claims of the latter. 1 Sm. & Gif. 228; 5 De G. M. & G. 555; *Simpson v. Graves*, Riley, Ch. (S. C.) 232. At all events both parties to the settlement must have known of the intended fraud in such cases. § 174; *Sharpe v. Foy*, L. R. 4 Ch. 35; L. R. 4 Eq. 390; L. R. 9 Eq. 555; *Obermayer v. Greenleaf*, 42 Mo. 304; *Brame v. McGee*, 46 Ala. 170. As to the good faith of a grantee in such fraudulent settlements, see 79 Va. 92.

<sup>2</sup> § 175; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Finch v. Finch*, 10 Ohio St. 501; 1 Bailey, Ch. (S. C.) 228; Riley, Ch. (S. C.) 219; *Satterthwaite v. Emley*, 3 Green, Ch. (N. J.) 489; 10 Wis. 55.

<sup>3</sup> The payment of money may afford a special consideration. 2 Atk. 478; 15 Beav. 414. Other considerations, such as forbearance to sue, or the fulfilment, in return, of terms prejudicial, may intervene. Riley v. Riley, 25 Conn. 154; *Bradley v. Saddler*, 54 Ga. 681; *Hammersley v. De Biel*, 12 Cl. & Fin. 45; 1 Mac. & Gor. 571. A mere oral agreement between the intended husband and wife, followed by marriage and a continued recognition by acts, especially in connection with such other consideration, is held sufficient for the wife's favor in some late American cases, as between the parties and those claiming under them. See *Schouler, Hus. & Wife*, § 350; and cases cited; *post*, §§ 176, 179. And see further, 2 Johns. Ch. (N. Y.) 481; 9 Ind. 347; 20 Conn. 581; 1 Md. Ch. 523.

be generally observed that equity pays no regard to the externals, but considers only the substantial intention of the parties; and hence articles or an agreement will be binding between husband and wife without the intervention of trustees; for here the husband himself may be bound to act as trustee.<sup>1</sup> And hence the signature of the wife to an instrument or an indenture deed is by no means indispensable in order that her rights upon marriage consideration be sustained.<sup>2</sup> But it is held that an antenuptial instrument, executed by the husband only, binds himself alone by its purport, though in form an indenture.<sup>3</sup> Oral settlements should only be sustained if at all, on clear and convincing proof; for such arrangements ought properly to be in writing.<sup>4</sup>

188. In this connection the use of the term "marriage articles" is properly to be noticed. When promises and agreements in consideration of marriage are meant to become the ground-work of settlements, they are called marriage articles.<sup>5</sup> Marriage articles, although unskilfully drawn, are favored, so long as they are *bona fide* articles, and the party marrying upon their faith had good reason to rely upon them as such.<sup>6</sup>

<sup>1</sup> § 176; 50 Ind. 636; Logan v. Goodall, 42 Ga. 95. But see Dillaye v. Greenough, 45 N. Y. 438.

For a strong instance of the liberality of the equity courts in this respect, see early decision in 2 Vern. 280 (bond). Equity has great advantage over the law in enforcing a bond in such instances. See Prebble v. Boghurst, 1 Swan, 309; 2 P. Wms. 242; Ambl. 565. Bonds have been frequently enforced in this country as constituting a marriage settlement. 3 Strobb. Eq. (S. C.) 197; Hunter v. Bryant, 2 Wheat. (U. S.) 82; 1 Dev. & Bat. Eq. (N. C.) 389; Baldwin v. Carter, 17 Conn. 201.

<sup>2</sup> Cochran v. McBeath, 1 Del. Ch. 187.

<sup>3</sup> Chadwell v. Wheless, 6 Lea (Tenn.), 312.

<sup>4</sup> Hunt's Appeal, 100 Penn. St. 590; 62 Miss. 302. And see *ante*, 183.

<sup>5</sup> § 177. These are often drawn up hastily and signed just before the wedding for want of more ample time; and the final deed of settlement, if it conforms, will supersede them. Macq. Hus. & Wife, 246.

<sup>6</sup> Neves v. Scott, 9 How. (U. S.) 196; Hooks v. Lee, 8 Ired. Eq. (N.C.) 157; Rivers v. Thayer, 7 Rich. Eq. (S. C.) 136; Kinnard v. Daniel, 13 B. Monr. (Ky.) 496; 3 Jones Eq. (N. C.) 113; Smith v. Moore, 3 Green Ch. (N. J.) 485; Desaus. (S. C.) 456. The language of the Statute of Frauds has a material bearing here.

Any settlement made after marriage, in pursuance of marriage articles, or what may be construed as such, receives the full support of the marriage consideration, and must prevail accordingly against creditors, purchasers, and each of the married parties.<sup>1</sup>

189. Promises made in consideration of the marriage by a third party, such as the wife's father, may afterwards be enforced against him by way of his own settlement. But it must appear that the enforcing spouse knew of the promise, and that it entered as an ingredient into the marriage.<sup>2</sup> The promise of a third party may be for one spouse's benefit; or it may be for the mutual benefit of the married parties, and enforceable accordingly.<sup>3</sup>

190. Where an antenuptial contract was made but accidentally lost or destroyed, secondary proof of its terms may be furnished.<sup>4</sup>

191. As to other general requirements, antenuptial agreements are so liable to misapprehension and fraud, that they

<sup>1</sup> Letters or a correspondence before marriage may establish an antenuptial settlement, or they may constitute marriage articles and support a settlement made in pursuance of their terms. 1 Cl. & Fin. 611; *Hammersley v. De Biel*, 12 Cl. & Fin. 45; 15 Beav. 349; *Kinnard v. Daniel*, 13 B. Monr. (Ky.) 496; 17 Ch. D. 361, 365. But their authenticity must be well established, and they must be sufficiently certain and definite in terms. § 177; 13 B. Monr. 496; *Montgomery v. Henderson*, 3 Jones Eq. 113; 9 Ves. 315; 2 Sch. & Lef. 384; *Chambers v. Sallie*, 29 Ark. 407; *White v. Bigelow*, 154 Mass. 593.

<sup>2</sup> § 178. The husband cannot, upon finding, after marriage, that his wife, while single, had received a letter from her father, promising a certain allowance, hold the latter to specific performance. 2 P. Wms. 66.

<sup>3</sup> *Coverdale v. Eastwood*, L. R. 15 Eq. 121 (a harsh case).

Courts of equity have frequently refused, however, to enforce marriage agreements on the ground of their being inconsistent, uncertain, and unintelligible. *Franks v. Martin*, 1 Eden, 309; 3 Jur. n. s. 107; 1 Jo. & Lat. 539. And see *ante*, 188, as to letters between the parties. And particularly is this found true of loose expressions contained in letters written by relatives of the married parties, upon which the attempt is made to render them chargeable when the marriage was not thereby induced. *Hincks v. Allen*, 28 W. R. 533. See *Teasdale v. Braithwaite*, 5 Ch. D. 630; § 173.

<sup>4</sup> § 179; *West v. Walker*, 77 Wis. 557.

will not be enforced in equity unless the court is satisfied that they were made, and that the marriage consideration really entered into the contract.<sup>1</sup> If in the form of a writing, due delivery should appear; though if the written contract be produced from the proper custody, and its execution proved proper delivery is readily presumed.<sup>2</sup> Under modern rules of separate use, a valid marriage settlement may be made without the designation of a trustee; though in such contracts, when drawn up with due formality, trustees are commonly interposed outside the marriage relation, who hold the legal title; and such is unquestionably the more prudent arrangement.<sup>3</sup>

192. A secret settlement or voluntary transfer in whole or in part of her property made by a woman upon third persons, while engaged, and contemplating marriage, is liable to be set aside in equity as a fraud upon the marital rights of her intended husband, at the husband's instance, when he learns of it.<sup>4</sup> A corresponding rule as to fraud would, doubtless,

<sup>1</sup> § 180; *Coles v. Trecothick*, 9 Ves. 250; 1 Eden, 309; 3 Jur. n. s. 107; 3 Jones Eq. (N. C.) 113; *Kinnard v. Daniel*, 13 B. Monr. 496.

<sup>2</sup> See *Smith v. Moore*, 3 Green Ch. (N. J.) 485. See summary of doctrine in *Bold v. Hutchinson*, 20 Beav. 259; § 180. As to an antenuptial conveyance of land to a trustee to stand seised to the female grantor's use, see 63 N. H. 109.

<sup>3</sup> § 180; *Cochran v. McBeath*, 1 Del. Ch. 187; *Haymond v. Lee*, 33 Gratt. (Va.) 317; *Schouler, Hus. & Wife*, § 356.

See peculiar instances of settlement in *Lant's Appeal*, 95 Penn. St. 279; 100 Penn. St. 590; *Osgood v. Bliss*, 141 Mass. 474; 164 Penn. St. 520; *Stewart v. Mulholland*, 88 Ky. 38; 187 Ill. 636; 126 Ala. 503 (fraudulent procurement of signature).

<sup>4</sup> § 181. 1 Myl. & K. 618; *Macq. Hus. & Wife*, 36; *England v. Downes*, 2 Beav. 522; 2 Ch. Rep. 81; 1 Eq. Cas. Ab. 59, pl. 1. *Prima facie*, her transactions as a *feme sole* with reference to her own property are valid both at law and in equity; it is only because of the fraud that her husband can afterwards obtain relief against them; and the secrecy of the proceeding is a material element, from which fraud will be inferred. 2 Beav. 522. The husband must have been kept in ignorance of the transaction up to the moment of marriage. *St. George v. Wake*, 1 Myl. & K. 610. Actual concurrence on the part of the intended husband in his wife's settlement will be conclusive against him, and it is the usual practice with English conveyancers at the present day to make the

apply to a husband, who, before marriage, had made a secret transfer or conveyance of his own property to his wife's injury; not, however, without regard to the difference which may subsist at law between their marital rights in each other's property.<sup>1</sup> Indeed, it is sometimes said that any designed and material concealment regarding one's own property, whereby a secret transfer of importance to a third party is made or a marriage settlement procured from the betrothed party quite unfair and disproportionate to their mutual fortunes, ought to avoid an antenuptial contract at the will of the spouse who has been thereby injured.<sup>2</sup>

193. Equity will sometimes reform or construe a marriage settlement. Marriage articles are frequently prepared in great haste, and many questions must necessarily arise as to the intention of the parties; these the courts of equity endeavor to meet by adopting the intention of the parties as their true

intended husband a party to all instruments executed by the intended wife in contemplation of or during a treaty of marriage. 2 Bro. C. C. 545; § 181. Secret and voluntary conveyances, made by a woman contemplating marriage, may be set aside on the husband's subsequent application as a fraud upon his marital rights, and such is the English and American rule. 2 Kent, Com. 174, 175; 1 Myl. & K. 618; 2 Beav. 522; *Tucker v. Andrews*, 13 Me. 124, 128; *Williams v. Carle*, 2 Stockt. (N. J.) 543; *Freeman v. Hartman*, 45 Ill. 57; 73 N. C. 145; 8 Baxt. (Tenn.) 211; *Gregory v. Winston*, 28 Gratt. (Va.) 102. And see 84 Kan. 740.

If the wife's transfer or conveyance to another, under such circumstances, be without valuable consideration to herself or in derogation of her interest, there is the less reason why equity should uphold it. *Baker v. Jordan*, 73 N. C. 145; 6 Gratt. (Va.) 332; *Hall v. Carmichael*, 8 Baxt. (Tenn.) 211. See further 25 Ohio St. 500 (statutory changes); 22 Gratt. (Va.) 177.

<sup>1</sup> See 8 Bush (Ky.), 201; *Gainor v. Gainor*, 26 Iowa, 337; *Murray v. Murray*, 90 Ky. 1; 70 Ala. 75; 79 Iowa, 555. Lapse of time and other circumstances may remove any presumption of fraud or unfairness on his part. *Butler v. Butler*, 21 Kan. 521.

<sup>2</sup> § 181; 57 Penn. St. 120; *Kline's Estate*, 64 Penn. St. 122; 124 Penn. St. 406; *Achilles v. Achilles*, 137 Ill. 589. See further 137 Ill. 589; *Pulling, Re*, 93 Mich. 274; *Lamb v. Lamb*, 130 Ind. 273; 193 Penn. St. 605 (no fraud intended); 199 Penn. St. 366 (wife obstructed); 128 N. C. 503.

guide, and taking it for granted that the articles are merely minutes which the settlement may explain more at large, but which are not to be literally followed.<sup>1</sup>

**194. Mistakes in marriage settlements, either through error or fraud,** will in general be corrected in equity; the principle being that the parties are to be placed in the same situation in which they would have stood if the error to be corrected, or the fraud, had not been committed.<sup>2</sup> The provisions of an antenuptial settlement are beneficially construed, if possible.<sup>3</sup>

<sup>1</sup> § 183; 1 P. Wms. 631; 2 Atk. 545; Drn. & War. 18. But see 2 Myl. & Cr. 711; *Legg v. Goldwire*, Talbot, L. C., in *Forrester*, 20. And curiously enough in an English case under this head, though the settlement followed the precise words of the marriage articles, the court reformed it, in order to carry out the actual intention of the parties. 2 P. Wms. 350. "Where articles are entered into before marriage, and settlement made after marriage, differing from the articles, this court will set up the articles, against the settlement." That is to say, the court will order the settlement to be reformed. *Legg v. Goldwire*, *Forrester*, 20. As to portions for children, &c., see 1 Atk. 522; *Wallace v. Wallace*, 82 Ill. 430; *Russell v. St. Aubyn*, L. R. 2 Ch. D. 398. As to the right to damages of one spouse as against the other, see *Jeston v. Key*, L. R. 6 Ch. 610.

<sup>2</sup> 2 Kay & Johns. 770; 6 Jones Eq. (N. C.) 155; *Love v. Graham*, 25 Ala. 187; 8 Leigh (Va.), 1; *Brown v. Brown*, 31 Gratt. (Va.) 502; *Russell's Appeal*, 75 Penn. St. 269; in *Burge v. Burge*, 45 Ga. 301 (correction made after death of a spouse). Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured will be set aside. *Pierce v. Pierce*, 71 N. Y. 154; *Daubenspeck v. Biggs*, 71 Ind. 255; 2 Lea (Tenn.), 126; 75 Penn. St. 269; *ante*, 192.

<sup>3</sup> 11 Lea (Tenn.), 489. Equity rules concerning separate use may be here invoked. *Prentiss v. Paisley*, 25 Fla. 927. Equity, moreover, sometimes refuses to enforce an antenuptial settlement, not only because of its fraudulent character as regards the one or the other spouse, but on the ground that it is improvident; yet relief of this sort is rarely afforded, and especially so where a third party, or the husband, not the wife, seeks it. *Everitt v. Everitt*, L. R. 10 Eq. 405; *Dillaye v. Greenough*, 45 N. Y. 438; 25 Fla. 153. As to construction of antenuptial settlements, see § 183. Such settlements may provide for settling after-acquired property.

Reservations, as *e. g.* to dispose by will, must, if made, be respected. *Bishop v. Wall*, 3 Ch. D. 194; *Rogers v. Cunningham*, 51 Ga. 40; *Russell's Appeal*, 75 Penn. St. 269; 3 Heisk. (Tenn.) 593. And see 4 Ill. App. 579; *Hafer v. Hafer*, 33 Kan. 449; 73 Ga. 575; 182 Ill. 60. There may be a power of disposition in the wife to be exercised by a will or

195. As to rescission or avoidance, an antenuptial settlement made in good faith upon a valid consideration is not to be rescinded by parol after the marriage;<sup>1</sup> and the trust of the intended spouses in favor of their next of kin who are volunteers is not revocable by them.<sup>2</sup> But desertion without just cause, or unfaithfulness to the marriage obligations, is held a bar to enforcement of the settlement by the delinquent party.<sup>3</sup> A positive antenuptial contract, it is held, cannot be avoided by an arbitrary refusal of the man to marry; but where both man and woman mutually decide not to marry, they may have

otherwise provided, in such settlement. The wife may even be authorized thus to dispose freely of her own property without her husband's consent or concurrence. *Williamson v. Yager*, 91 Ky. 282; *Beardsley v. Hotchkiss*, 96 N. Y. 201. But such power must not be defectively executed by her. 101 Ill. 242. One spouse may be held bound to claim no rights whatever or only some specified interest in the other spouse's estate as survivor. *Ludwig's Appeal*, 101 Penn. St. 535; 61 Md. 436, 517; 22 W. Va. 130; *Young v. Hicks*, 92 N. Y. 235; 139 Mass. 144; 109 Ill. 225; 183 Ill. 486; 63 Iowa, 55; 86 Ga. 637; 59 Conn. 576; 116 Ind. 545; 91 Tenn. 241; 112 Mo. 442. A resulting trust may be established in investments protected to a wife by such settlement. 39 Ohio St. 259. And specific performance of the settlement will be enforced as against either spouse and third parties having notice. *Stratton v. Stratton*, 58 N. H. 473.

Marriage settlements are very common in England, among parties possessed of large means; not generally so in this country, although many are made in certain States. American policy is to dispense with trusts, and place a married woman's separate property in her own absolute keeping. Yet marriage settlements might often be well resorted to in order to equalize the burdens and privileges of matrimony, while our local legislation remains in its present crude condition. If settlements of property are made to the wife's separate use, the usual equitable rules apply, as to making the property liable for her debts and engagements.

The local registry system in the United States raises questions of constructive notice as to marriage settlements and the property embraced therein. § 183; 66 Ga. 720; 75 Mo. 239.

The intended spouses may expressly agree that the wife's acquisitions, &c., shall be her separate estate. 82 Ky. 129. And see 54 Vt. 188; 79 Ky. 517.

<sup>1</sup> *Craig v. Craig*, 90 Ind. 215.

<sup>2</sup> *Paul v. Paul*, 19 Ch. D. 47; 20 Ch. D. 742; overruling 15 Ch. D. 580. As to their legal liabilities to others, such as an antenuptial debt due to the wife's creditor, see 75 Va. 380.

<sup>3</sup> *York v. Ferner*, 59 Iowa, 587; 80 N. W. 551. Cf. 87 Mo. 437.



the settlement broken up.<sup>1</sup> A power of mutual revocation is sometimes prudently reserved in a deed of settlement.<sup>2</sup>

<sup>1</sup> *Conner v. Stanley*, 65 Cal. 183; *Essery v. Cowland*, 26 Ch. D. 191.

<sup>2</sup> *Gaither v. Williams*, 57 Md. 625. Mutual cancellation may be permissible, but whether a mutilated instrument was duly and intentionally cancelled or not is matter for proof. *Barclay v. Waring*, 58 Ga. 86; 35 So. 576 (rescindable).

## CHAPTER XIV.

### POSTNUPTIAL SETTLEMENTS; GIFTS AND GENERAL TRANSACTIONS BETWEEN SPOUSES.

196. The important distinction between settlements before and settlements after marriage is that, while the former have the marriage consideration to support them, the latter are without it.<sup>1</sup> Postnuptial settlements, like other voluntary transactions, will be valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent upon others. Postnuptial settlements, therefore, must be viewed in two different aspects: (1) as between the married parties and the creditors or purchasers of either; (2) as between husband and wife themselves.<sup>2</sup>

<sup>1</sup> *Ante*, 183. 2 Atk. 448. The term "postnuptial settlements" must not confuse the reader's mind. We use the language of the text-writers without meaning to imply that it is appropriate, or that antenuptial and postnuptial settlements constitute two branches of one general subject. On the contrary, postnuptial settlements are usually nothing more nor less than gifts of real or personal property, or of both, between husband and wife, which equity places, notwithstanding the disabilities of coverture, upon the footing of other gifts; though sometimes they are upon valuable consideration between the spouses such as our modern marital legislation establishes. "Gift," in the more technical sense, concerns personal property, but we use the word here in its wider sense. 2 Schouler, Pers. Prop. 55. See § 188. Furthermore, it should be remembered that formal settlements made between parties in the marriage state, in pursuance of articles or memoranda signed before marriage, are not technically postnuptial settlements (as the name itself would seem to indicate); for the settlement relates back to the antenuptial stipulations, however loosely these may have been drawn up, and it is protected by the marriage consideration, like all other antenuptial contracts. § 184.

<sup>2</sup> § 186. There are two English statutes which control this subject, as concerns creditors and purchasers, to a great extent, wherever the hus-

197. On the ground that a valuable consideration is interposed, a postnuptial settlement has been sustained against creditors and purchasers.<sup>1</sup> So voluntary settlements may become valid by matter *ex post facto*.<sup>2</sup> If the property was the wife's separate property, and so consistently treated, the husband's creditors, of course, cannot reach it.<sup>3</sup>

band makes a postnuptial settlement upon his wife and offspring. The first is that of 13 Eliz. c. 5, in favor of creditors; the second that of 27 Eliz. c. 4, in favor of purchasers; the one being directed against fraudulent conveyances of all property with intent to defeat or delay creditors; the other against fraudulent or voluntary conveyances of lands designed to defeat subsequent purchasers. The bankrupt or insolvent acts are material to consider in the former connection.

Similar legislation is found in this country, and the local statutes applicable should be carefully considered by the practitioner. The right of creditors existing at the time of the settlement is regarded more strenuously than that of subsequent creditors of the settlor. Subsequent *bona fide* purchasers for value are protected by the latter statute, which in substance has also been re-enacted or recognized in the United States; the principle being largely extended so as to embrace transactions in either real or personal property. See §§ 185-187 and cases cited. The registry of settlement deeds simplifies the doctrine so far as parties subsequent are concerned. The following modern cases, among others, may be examined under the present head. *Schreyer v. Scott*, 134 U. S. 405; 111 U. S. 117; 90 Mich. 24; 103 U. S. 766; 3 Johns. Ch. (N. Y.) 481. Decisions are not uniform, but existing creditors receive special solicitude, rather than those subsequent, according to the weight of authority. § 187; 84 Iowa, 246; 98 Ala. 620; 24 N. J. Eq. 184; 53 Ill. 186; 41 Ind. 339; 131 Penn. St. 385.

<sup>1</sup> § 188; *Ambl.* 121; 10 Ves. 140; Fox, *ex parte*, L. R. 1 Ch. D. 302; L. R. 6 Ch. 228; *Magniac v. Thompson*, 7 Pet. (U. S.) 348.

<sup>2</sup> 1 Sid. 133; 5 Ves. 877; 2 Tenn. Ch. 763.

<sup>3</sup> Cs. 8, 9; 55 Vt. 362. As to the modern presumption, see 85 Ind. 1 (receipt by husband); 30 Minn. 209.

A valuable consideration is interposed where the husband has transferred property to his wife in consideration of payment from her separate estate. 26 Barb. (N. Y.) 420; 7 Pick. (Mass.) 533; 1 Head (Tenn.), 511; 8 Minn. 226; 44 Miss. 15; 51 Me. 246; 26 Minn. 97; 16 N. Y. Supr. 397. And where he conveys what her equity entitles her to claim. 15 Gratt. (Va.) 363. And see *Schreyer v. Scott*, 134 U. S. 405. And where he has appropriated a like amount of his wife's property without her consent. *Wiley v. Gray*, 36 Miss. 510. So where the wife pays her husband's debts from her separate earnings. 39 Barb. (N. Y.) 417. Or releases her dower or homestead. 9 Md. 532; 37 Mich. 563; 63 Ind. 93; 15 Fla. 130; 32 Gratt. (Va.) 812; 3 Paige (N. Y.), 440; 46 Ark. 542; 6 Ind. 121; 28

198. There may be a settlement by the wife upon her husband under the scope of our modern legislation; and in such a case corresponding doctrines will apply.<sup>1</sup>

199. As between the spouses themselves, and independently of the rights of creditors and purchasers, a postnuptial settlement may take effect. Although a direct gift of property by the husband to the wife is void at law, it will be sustained in equity, so far as they are concerned and their heirs, personal representatives and assigns. In general, to constitute a voluntary gift between parties, it must be complete, or courts of equity will not enforce it; and not only must the intention to give clearly appear, but that intention must have been executed.<sup>2</sup> All voluntary conveyances, though void against creditors and purchasers for value, are good against the grantor and those claiming under him.<sup>3</sup>

Ala. 432. But see 85 Wis. 214. Or lends to the firm of which her husband is a member. 36 N. J. Eq. 380. Or, in general, releases her interest in his property. *Davis v. Davis*, 25 Gratt. (Va.) 587. Or advances money to the husband to buy land. 71 Ind. 459. Or where the husband is indebted to her for rents collected from her separate real estate. 55 Ga. 332; 50 Miss. 103. Or upon any debt due her from him. 63 Me. 326; 42 Mich. 542; 90 Penn. St. 507; 91 Mich. 475; 81 Wis. 151; 48 Md. 439. See also 27 Gratt. (Va.) 587; 60 Ga. 82; 87 Penn. St. 510. But not upon a claim for the husband's mere appropriation, without any such agreement to refund. 31 N. J. Eq. 665. See also 11 W. Va. 122. And see Schouler, *Hus. & Wife*, § 380; 76 Va. 758; 106 Ill. 36. In some late cases the wife appears to be treated as a preferred and privileged creditor rather than a *bona fide* purchaser for value. 40 Kan. 5; 76 Iowa, 377; 48 N. J. Eq. 615; 124 Ind. 412. See further 115 N. Y. 122; 160 Penn. St. 172.

But where the consideration advanced by the wife is inadequate, equity will never sustain the settlement to the injury of creditors further than to secure the repayment thereof, and not always even to this extent; especially if she be privy, with her husband, to a fraud upon others. 6 Mich. 456; 2 Beas. (N. J.) 403; 7 Bush (Ky.), 337; 13 Ired. 206; 27 Penn. St. 469; 12 Gratt. (Va.) 372; 44 Penn. St. 43. But though the price be inadequate, a gift may have been intended. 102 Penn. St. 59.

<sup>1</sup> § 188 a; 151 Mass. 132 (as to fraud upon creditors).

<sup>2</sup> § 189; 1 Madd. 176; *Kekewich v. Manning*, 1 De G. M. & G. 188. The intervention of a trustee aids in this respect. 6 Ves. 662; 1 Hare, 470; 1 De G. M. & G. 192; 18 Beav. 289.

<sup>3</sup> 2 Myl. & K. 510; *Doe v. Rusham*, 17 Q. B. 724; *Penfold v. Mould*,

**200. Gifts from wife to husband** are by no means rare in the present connection. But in the latter instance fraud or undue

L. R. 4 Eq. 562; *Fox v. Hawks*, L. R. 13 Ch. D. 822; 4 Comst. (N. Y.) 284; *Coates v. Gerlach*, 44 Penn. St. 43; *Jennings v. Davis*, 31 Conn. 134; 2 Md. Ch. 353; 16 Tex. 286; *Hunt v. Johnson*, 44 N. Y. 27; 35 Ind. 181; *Kitchen v. Bedford*, 13 Wall. (U. S.) 413; 12 Bush (Ky.), 459; 114 Mass. 167. Statutes sometimes limit the amount of property which a husband may give the wife, especially as against his creditors. 158 Mass. 342.

There should be a clear irrevocable gift to a trustee for the wife, or some positive act by the husband, by which he divests himself of the property, and engages to hold it for the wife's separate use, or allows the wife such personal control of it by his delivery as modern policy may permit. The precise extent to which the rule of a gift without a trustee will be enforced, and the proof requisite in any case, depends greatly upon the liberality of the married women's legislation in any particular State. § 189; 33 Conn. 105; 23 Barb. (N. Y.) 565; 31 Conn. 134; 2 R. I. 518; *Wade v. Cantrell*, 1 Head (Tenn.), 346. For the principles applicable to such gifts, see 2 Schouler, Pers. Prop. Part V. c. 2. Thus the promissory note of a creditor or other third party may be legally transferred by the husband to his wife under some of the married women's acts; and independently of such statutes on equitable grounds. His voluntary settlement of choses or incorporeal personalty upon her with delivery is good, *prima facie*; and this may include an assignment of a claim due him. The husband may make a gift to his wife if depositing in some savings-bank on his wife's separate account, by his acts binding the bank to account to her. 176 N. Y. 603. Leasehold property may be assigned to the wife by way of gift. Where the husband gives corporeal property there should be some visible change of possession manifested; and in gifts, as of furniture, of that which remains in the common dwelling-house, there may be difficulty in establishing a transfer. The wife may be the grantee, under due statutory formalities, of real estate from her husband, or of real and personal property combined. Rents and profits may be secured to her exclusive beneficial use. But to prove the executed gift, so as to establish a *bona fide* transfer against the husband's creditors, involves, of course, the greater difficulty. See § 189. Oral gifts of land or its profits are not favored, for they are opposed to the statute of frauds. *Williams v. Walker*, 9 Q. B. D. 576; 107 Ill. 404; 138 Mass. 540; 6 Lea (Tenn.), 240. See 96 N. C. 139. But gifts of the wife's earnings (if still the husband's), or of any personal property of the husband, are favored so long as creditors be not prejudiced. 56 Vt. 586; 143 Ill. 719; 65 Wis. 183; 96 N. Y. 538. And such gifts of personalty may be by parol. 85 Mo. 580; 113 N. C. 136.

A husband may make a valid gift *causa mortis* to his wife upon the usual conditions. 134 Mass. 138. As to that of a wife to her husband,

influence may be readily suspected; and transactions of this sort are scrutinized by the courts with great care.<sup>1</sup>

see 92 Ky. 304; 81 Me. 231. A husband, under modern acts, may make valid transfer of a judgment to his wife. 157 Penn. St. 200. Or give to her his interest as purchaser in a contract for selling land. 127 N. Y. 587. Even prior to such legislation a husband might by his uniform course of conduct allow the wife's antenuptial personal property to be for her sole and separate use, as between himself and her, without a trustee's intervention. 101 Mo. 597. He might, after reducing into possession, invest the fund so that it should belong to her alone. 103 N. C. 194; 104 N. C. 197.

But a gift from a husband to his wife of his real and personal property which is extravagant and exhaustive of his estate, or where the wife is shown to be of grossly immoral character, is not to be protected in equity. 86 N. C. 139. Nor property of a husband which the wife invests without his consent at all. 106 Penn. St. 358. Nor is a settlement between husband and wife for the benefit of some third person to whom the husband is under no legal or moral obligation, regarded favorably. 79 Ky. 230.

The circumstances under which a husband's transfer is made is always material here. As where one transfers to his wife by way of bailment or agency, or as security or upon some mutual undertaking, or as a qualified gift. L. R. 20 Eq. 328; *Jones v. Clifton*, 101 U. S. 225; 65 Ill. 212; 112 Mass. 175; 45 Conn. 572; 32 N. J. Eq. 174.

<sup>1</sup> 4 Edw. Ch. 433; 11 E. L. & Eq. 106; *Jones Re*, 6 Biss. (U. S.) 68; 9 Rich. Eq. (S. C.) 535; 14 Mich. 72; 5 Tex. 195; 9 Mich. 45; 82 Ga. 329; 135 Ill. 482. As to gifts and loans of the wife's separate property to her husband, including profits and income, see ca. 10, 11. If children are injured by such gift, all the more is scrutiny required. 73 Md. 386. See 24 S. C. 273. No presumption of undue influence arises where the husband gives to his wife. 193 Penn. St. 530; 126 Cal. 180.

All such provisions for valuable or meritorious consideration, even if made without the intervention of a trustee, may, though void in law (independently of suitable married women's acts), be enforced in equity if fairly made between the parties, and with no fraudulent intent upon others concerned; a rule which, with particular force, sustains an indebted husband's provision in his wife's favor, wholly or partially executed. § 190. See *ante*, 197; 49 Iowa, 382; 6 Col. 543. Not a good consideration. *Roberts v. Frisby*, 38 Tex. 219; 39 Tex. 49; 119 Ind. 138; 18 Hun (N. Y.), 472; 50 Vt. 653; *Perkins v. Perkins*, 1 Tenn. Ch. 537 (good consideration); *Kesner v. Trigg*, 98 U. S. 50 (wife as creditor); 55 N. H. 279; 35 Ind. 181; 18 Wall. (U. S.) 141 (release of dower); 97 Mich. 284. And see 46 Minn. 1; 153 Mass. 17.

Equity will relieve against any unjust advantage obtained by one spouse over the other in their confidential relations deceitfully or oppres-

201. The common-law requirement that trustees shall intervene in conveyances or transfers between husband and wife no longer prevails to any great extent, in England or the United States, as a doctrine of equity.<sup>1</sup> But a trustee, or some third person by way of a conduit of title, is always desirable, as affording better presumptive assurance of legal intention and good faith; and in some States it is still a rule that the husband and wife can only contract or transact with one another through the intervention of third persons, and that they cannot at law convey or transfer directly to one another.<sup>2</sup>

sively, by way of postnuptial gift. 15 Col. 478; 39 N. J. Eq. 211; 181 Mass. 458.

<sup>1</sup> *Jones v. Clifton*, 101 U. S. 225; *Baddeley v. Baddeley*, 26 W. R. 850; 13 Bush (Ky.), 23; 6 Col. 543; 15 Neb. 432; 102 Mo. 104.

<sup>2</sup> § 190; 10 Iowa, 412; *Johnston v. Johnson*, 1 Grant (Penn.), 468; *Pike v. Baker*, 53 Ill. 163; 50 Ala. 182; 119 N. Y. 540; 81 Wis. 80; § 193.

In general, wherever a contract is just and reasonable and would be good at law when made with trustees for the wife, and especially if for good and meritorious consideration, that contract will be sustained in equity, as between the spouses themselves, when made between husband and wife without the intervention of trustees, notwithstanding that at common law spouses could not make mutual contracts. *Wallingsford v. Allen*, 10 Pet. (U. S.) 583; § 191 and cases cited; 3 P. Wms. 334; 9 Ind. 347; *Coates v. Gerlach*, 44 Penn. St. 43; 16 Iowa, 496; 20 Ala. 721; *Sims v. Rickets*, 35 Ind. 181; *McCampbell v. McCampbell*, 2 Lea (Tenn.), 661; *Myers v. King*, 42 Md. 65. Such is still the legal rule in many States. 117 N. Y. 411. For a strong illustration, see 24 Vt. 375. And see 78 Me. 325; 90 Tenn. 195. The married women's acts, as yet, seldom permit of a wife's executory contracts with any one outside her separate estate or separate trade or dealings with third parties. 112 Mass. 99; 89 Ill. 427; 37 Mich. 319. Some statutes are explicit enough for such purposes. 89 Ill. 349. And see *Schouler, Hus. & Wife*, § 394, and appendix. But whatever the law will compel parties to do, they may do voluntarily; and this is a principle applicable to transactions as between husband and wife, so far as equity may exercise jurisdiction in the case. See *Campbell v. Galbreath*, 12 Bush (Ky.), 459; *Randall v. Randall*, 37 Mich. 563. A wife may now own a chattel mortgage on her husband's property and enforce it as against his attaching creditors. 157 Mass. 228. Where the husband conveys upon the wife's promise to reconvey, her agreement to reconvey may now be forced in equity against her. 62 Conn. 403. In other modern cases equity compels the wife's property to fulfil her express engagement to her husband on consideration. 117 Ind. 94.

202. The intervention of a third person or ("dummy") is still held requisite in transactions between husband and wife in conservative States.<sup>1</sup> So it is the older rule that the husband cannot convey real estate to his wife directly, and without the intervention of a third person or trustee.<sup>2</sup>

203. At the common law, a conveyance of land to husband and wife and their heirs vests the entirety in each of them; and upon the death of one the survivor takes the whole estate, discharged of the other's debts.<sup>3</sup> This estate of entirety may be conveyed in fee or encumbered by the joint deed of husband and wife.<sup>4</sup> And in some States legislation has abro-

<sup>1</sup> See 118 Mass. 541; 155 Mass. 52 (promissory note); 158 Mass. 388; 176 Mass. 547; 63 Ill. 161; 67 Mo. 596; 24 Kan. 101; 2 Lea (Tenn.), 661; 58 Vt. 705; 50 Mich. 119; 92 N. Y. 152. This rule is now changed in many States. As to the enforcement of a husband's note given upon good consideration to the wife, see 52 Ark. 126. A fire insurance policy may be assigned directly by husband to wife. 159 Mass. 118.

<sup>2</sup> 17 Barb. (N. Y.) 103; Ransom v. Ransom, 30 Mich. 328; 107 Mo. 58. But conveyance by husband and wife to a third person and conveyance by such third person to one spouse vests title in such spouse accordingly. 4 Edw. Ch. (N. Y.) 70; 4 Mason (U. S.), 45; Garvin v. Ingram, 10 Rich. Eq. (S. C.) 130; 2 Bush (Ky.), 112; § 193.

A direct deed from one spouse to the other was usually void at law, nor would equity uphold it without good consideration shown. But under modern statutes and policy, a direct deed is good from husband to wife if *bona fide* made. 49 N. J. Eq. 463. Or from wife to husband. 92 Tenn. 391. Especially if for valuable or meritorious consideration; for in such cases, though void at law, the transfer will be upheld in equity. 36 W. Va. 11; Dean v. Metropolitan R., 119 N. Y. 540.

<sup>3</sup> § 193; 20 N. Y. 320; Banton v. Campbell, 9 B. Monr. (Ky.) 587; Gilson v. Zimmerman, 12 Mo. 385; Stelz v. Shreck, 128 N. Y. 263; 92 Tenn. 707; 173 Mo. 191; 132 N. C. 891; 182 Mass. 363. So, under a deed by husband and wife, reserving a life estate to themselves. Jones v. Potter, 89 N. C. 220. See 72 Ala. 589; 16 Lea, 448; 40 Kan. 442; 154 Ind. 594. Neither can convey or encumber the estate during marriage without the assent of the other, nor subject it to creditors. Bruce v. Nicholson, 109 N. C. 202; 63 Vt. 505; 96 Mich. 182.

<sup>4</sup> McDuff v. Beauchamp, 50 Miss. 531. See 103 U. S. 514; 129 N. Y. 17; 133 N. Y. 308. The husband may through a third party convey his interest in an estate by the entirety to his wife. 154 Mass. 537. Cf. 118 Ind. 34; 120 Ind. 568.



gated this common-law doctrine of entirety altogether, so as to substitute a common tenancy.<sup>1</sup>

**204.** The question whether a resulting trust is established in certain property of husband or wife comes up constantly in the latest American cases, with the extension of equity jurisdiction in the States and the new married women's legislation. Issues of this sort are made up not only where the claim is that of a wife against her husband, or of a husband against his wife, but in controversies between either one and the creditors of the other.<sup>2</sup> Equity, in recognizing husband and wife as distinct persons capable of contracting with one another and holding property adverse to one another's claims, affords the relief appropriate to such a situation. Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction, or will decline to aid a misconducting party.<sup>3</sup>

**205.** With the mutual right of suit now recognized it is sometimes a question under our latest marital legislation whether the wife can bring an action at law in damages against the husband, or the husband against the wife, over

<sup>1</sup> § 193 and cases cited; 62 W. Va. 616. And see 43 Minn. 398; 75 Ind. 401; 56 N. H. 105; 99 Va. 519. See mutual partition upheld in *Merritt v. Whitlock*, 200 Penn. St. 50.

The drift of modern policy, we may add, is unfavorable to extending to personalty this rule of survivorship, applicable originally to real estate. § 193; 35 Mich. 425. A savings-bank deposit in the joint names of husband and wife does not give the fund to the wife alone. 42 N. J. Eq. 352. Cf. 159 Mass. 415 (stock taken in their joint names). For husband and wife as joint lessees of a house, see 85 Ga. 816. As joint contractors, see (1891) 1 Q. B. 781.

<sup>2</sup> § 194; 54 Vt. 36; 90 Ind. 167; 63 Cal. 12; 98 Ill. 544; 66 Ala. 55; 88 Mo. 229; 143 Penn. St. 551; 144 Ill. 299; 90 Cal. 323; 32 W. Va. 203; 128 Ind. 48; 112 Mo. 412 (conveyance to a trustee).

Where claims of a wife upon her husband come in conflict with the claims of his creditors, the transaction out of which her claims arise ought to be scrutinized with great care, because the marital relation and influence afford opportunity for the fabrication of such claims. 45 N. J. Eq. 779.

<sup>3</sup> § 194; *Case v. Colter*, 66 Ind. 336; *Stone v. Wood*, 85 Ill. 603; *Tucker's Appeal*, 75 Penn. St. 354; *Lombard v. Morse*, 155 Mass. 186; 86 Ala. 357; 17 Ore. 348; 15 Col. 478.

matters touching their marriage relations, especially after they have quarrelled and separated.<sup>1</sup> The effect of modern legislation, while clouding the title as between the spouses, is certainly to enlarge the exclusive ownership and dominion of the wife over her own property.<sup>2</sup>

206. Insurance is frequently effected by a husband on his own life for the separate benefit of his wife; and local statutes confirm the wife's beneficial interest in policies thus taken out.<sup>3</sup>

<sup>1</sup> This new phase of public policy opens up suggestions not favorable to conjugal harmony. See the removal of such barrier asserted in 73 Hun (N. Y.), 386; 66 Hun, 386, where the wife had wrongfully carried off the husband's personal property. So, too, in *Haight v. McVeagh*, 69 Ill. 624; 49 Ill. App. 162. Replevin is allowed the wife to recover possession of personalty violently carried away by her husband. 125 Ind. 14. Or ejectment from her land. 131 Penn. St. 24. See also 86 Ga. 773; *ante*, 54.

<sup>2</sup> § 194 a. Equity or a divorce or ecclesiastical tribunal furnished formerly the only recourse for a wife; but equity restrained a husband upon the wife's petition from doing wrongful acts concerning her separate property.

<sup>3</sup> § 195. And see local statutes; 73 Mo. 201. The wife's interest cannot be revoked by the party thus insured, so that the benefit may be assigned to himself or his creditors. 59 N. H. 13. Nor can the wife thus transfer it. 75 Ga. 755; 122 N. Y. 337 (statute). But see 100 N. Y. 372; 85 N. Y. 593. But circumstances may arise in the payment of premiums upon a life policy such as to afford a just priority to creditors out of the fund; for fraud upon them must be avoided. An endowment policy is held subject to claims of creditors in 34 Neb. 611. And see *Holmes v. Gilman*, 138 N. Y. 369.

## CHAPTER XV.

### DEATH OF THE WIFE; RIGHTS AND LIABILITIES OF THE SURVIVING HUSBAND.

207. The husband becomes entitled to administer the wife's estate, upon her death. The court having jurisdiction in such matters must issue letters to him, and to him alone, unless he renounce or decline.<sup>1</sup> This right, however founded, is now regarded in England as unquestionable, and is expressly confirmed by the statute 29 Car. II. c. 3 (amendatory of statute 22 & 23 Car. II. c. 10).<sup>2</sup> This same right of the husband is generally, though not universally, recognized in this country, for in the different States are statutes which regulate the subject of administration; and these statutes are usually found to recognize and confirm the husband's preferred right to administer upon his wife's estate.<sup>3</sup> To this rule some exceptions have been introduced, however, in later years, both in England and the United States, owing chiefly to the modern facilities for separation and divorce, and to the enlarged capacity given the wife to act as a *feme sole*, and to dispose of her own property acquired during that condition of things.<sup>4</sup>

<sup>1</sup> § 196. The foundation of this claim has been variously stated; by some it is said to be derived from the statute 31 Edw. III., on the ground of the husband's being "the next and most lawful friend" of his wife; while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes.

<sup>2</sup> § 196; Wms. Ex'rs, 4th Am. ed. 366 *et seq.*

<sup>3</sup> 2 Kent, Com. 135; *Ib.* 410.

<sup>4</sup> Stephenson's Goods, L. R. 1 P. & D. 285; Cooper v. Maddox, 2 Sneed (Tenn.), 185. But the husband is not usually deprived of his right by mere separation short of divorce. A statute, the wife's legal will, or his own express agreement must be shown to debar him. Schouler, Executors, § 99; Kenyon v. Saunders (1894), R. I. The husband is sometimes made executor under his wife's will.

208. There is a distinction between property acquired by the husband absolutely by virtue of marriage, and property acquired in his representative capacity as her administrator or executor, at the common law.<sup>1</sup> But the modern change of policy with regard to a wife's debts, whereby the wife may hold separate property upon which her separate liabilities should be fastened, occasions an obvious departure in the latest decisions and statutes. Hence the statute rule now introduced into many States, that the husband shall be held liable as administrator on the estate of his wife for her debts only to the extent of the assets thus received by him, but so that her separate estate shall be liable for debts contracted upon the faith of it.<sup>2</sup>

209. As to the surviving husband's rights in his wife's personal property, we have seen that at the common law, and conformably to the doctrine of coverture, marriage operates as a gift, positive or potential, to the husband of the wife's personal property, both principal and income.<sup>3</sup> In these days it becomes important to understand how far the modern creation of a separate estate in the wife's favor may have modified this doctrine to the husband's detriment.<sup>4</sup> By the English statutes of distribution (and perhaps by the common law), not only is the husband entitled to administer upon his wife's estate in preference to all others, but, subject to the payment of such debts as bind him upon surviving her, he recovers her outstanding personal property to his own use and enjoyment, including rights vested and contingent, and funds at her disposal during her lifetime or held in trust for her, save so far

<sup>1</sup> § 197. See *e. g.*, *Heard v. Stamford*, Cas. temp. Talb. 173; 3 P. Wm. 409. And see *Hetrick v. Hetrick*, 13 Ind. 44; 1 Green, Ch. (N. J.) 243; *Hill v. Goodrich*, 46 N. H. 41; *Bain v. Doran*, 54 Penn. St. 124.

<sup>2</sup> § 197; *Shelton v. Hadlock*, 62 Conn. 143; 83 Ga. 715.

<sup>3</sup> § 198; *ante*, 88. Hence *choses in action* unrecovered at her death belong, technically speaking, to her estate. *Ante*, 91.

<sup>4</sup> The English and American rule of equity appears to have treated the separate estate as ceasing upon the wife's death, so that the wife's property, not already the husband's, may be recovered for his benefit in due course of administration. *Ante*, 119; 24 N. Y. 372; *Ransom v. Nichols*, 22 N. Y. 110; 6 B. Mon. (Ky.) 576.

as he may be excluded by the terms of the trust.<sup>1</sup> But with the modern recognition of separate use, an exercise of the wife's testamentary appointment or will may be found to interfere with the husband's rights both as surviving administrator and distributee. Furthermore, the principle that the husband administers exclusively for his own benefit on his wife's estate is incompatible with the legislation of some States.<sup>2</sup>

**210. Every husband is bound to bury his deceased wife in a suitable manner; that is to say, he is bound at common law to defray all necessary funeral and burial expenses.<sup>3</sup> The**

<sup>1</sup> § 198. Even if he does not take out letters of administration, he is equally entitled to the property. *Clough v. Bond*, 6 Jur. 50. He is therefore said, when he administers, to administer for his own benefit, being the party in interest preferred to all others, so far as personal estate is concerned. § 198; 2 Bl. Com. 515; *Watt v. Watt*, 3 Ves. 246, 247. See *Olmstead v. Keyes*, 85 N. Y. 593 (insurance policy). As to collecting a note held by his late wife, see 131 Mass. 457. And see 5 Lea (Tenn.), 585 (conversion of wife's land into personalty). See also *Bartlett v. Bartlett*, 137 Mass. 156. And since husband and wife are not, properly speaking, next of kin to one another, the title the husband thus acquires may be designated as a title *jure mariti* under the statutes of distribution.

<sup>2</sup> § 198. In this country the modern tendency is not only to enlarge the wife's power of testamentary disposition, but to require administration to be taken out in all cases where a married woman with a separate estate dies intestate; nor is the surviving husband in all the States absolutely preferred to issue and other kindred either as administrator or distributee. 28 Vt. 765; 14 Ark. 603; 34 Ala. 565; 17 Conn. 201; 14 Ohio, 100; *Gill v. Woods*, 81 Ill. 64; *Wilson v. Breeding*, 50 Iowa, 629; *Woodman v. Woodman*, 54 N. H. 226. As to the wife's will, see *post*, 214. A dying wife's gift *causa mortis* of furniture is good, at all events if the husband assented at the time. 141 Penn. St. 114.

Postnuptial transactions between husband and wife give rise to delicate questions in the courts after the wife's death, where modern practice permits of an administration in conflict with the surviving husband's interests. See 81 Ill. 64; 24 Ohio St. 11; 3 Kay & J. 110; *Herrington v. Robertson*, 71 N. Y. 280. An antenuptial settlement properly worded may exclude the husband's right both to administer or to inherit; though not a simple settlement for the wife's benefit. 6 Gill & J. (Md.) 349; *Paine v. Hollister*, 139 Mass. 144; *Fowler v. Kell*, 22 Miss. 68; 12 B. Mon. (Ky.) 391; 132 Ill. 443.

<sup>3</sup> § 199. Even where the wife died separate from her husband, or died while the husband was abroad, he must defray the expense of others in

husband's right to the possession of the dead body of his spouse for preservation and burial is paramount, as a rule, to that of her next of kin and all others.<sup>1</sup>

211. Where the husband himself dies before the wife's outstanding personal chattels are recovered, his next of kin will be entitled to them in equity. This is the rule wherever, at all events, the husband's right to administer for his own benefit is recognized; for it is the necessary consequence of that doctrine. If the husband dies, leaving assets of his wife unadministered, the more rational rule has been that right of administration follows the right of estate, and devolves upon the husband's next of kin.<sup>2</sup>

212. The surviving husband's rights in the real estate of his deceased wife remain to be noticed. The immediate effect of coverture, as we have seen, is to invest the husband with the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture; this usufruct being in the nature of a freehold, with

this respect. 4 E. L. & Eq. 361; 1 H. Bl. 90; *Bradshaw v. Beard*, 12 C. B. n. s. 344. An infant husband may be bound by his contract for burial of his deceased wife or lawful children. *Chapple v. Cooper*, 13 M. & W. 252 (*personæ conjunctæ*). For American decisions, see *Smyley v. Reese*, 53 Ala. 89; *Sears v. Giddey*, 41 Mich. 590 (adult son assisting); 21 N. Y. Supr. 562; *Cunningham v. Reardon*, 98 Mass. 538; *Staples's Appeal*, 52 Conn. 425; 41 N. J. Eq. 299. Medical attendance in last illness, funeral expenses, and at least something to identify the grave, should be thus paid for. 100 Cal. 345; 30 Atl. 1124. The effect of the wife's separate ownership of property is considered in one or two late cases. See wife's estate charged in *McClellan v. Filson*, 44 Ohio St. 184 (statute); *M'Myn, Re*, 33 Ch. D. 575; *Weringer, Re*, 100 Cal. 345.

<sup>1</sup> § 199. See 9 Gray (Mass.), 248 (paramount right to remove the wife's remains); *Weld v. Walker*, 130 Mass. 423; *Larson v. Chase*, 47 Minn. 307. Separation by the husband's fault leaves the husband liable for funeral and burial expense of the wife. 98 Mass. 538. And see 41 Mich. 590.

<sup>2</sup> § 200; 10 Paige (N. Y.), 415; *Bryan v. Rooks*, 25 Ga. 622; *Ward v. Thompson*, 6 Gill & J. (Md.) 349; 8 Ired. Eq. 52; 1 Jones Eq. (N. C.) 204. See *Fleet v. Perrins*, L. R. 4 Q. B. 500; s. c. L. R. 3 Q. B. 536; *Risdon's Goods*, L. R. 1 P. & D. 637. But modern policy requires in such case that the wife's debts be paid from her assets as before. 83 Ga. 715; 86 Ga. 166.

beneficial enjoyment of rents and profits, and lasting, at all events, during their joint lives.<sup>1</sup> But the husband at the common law may acquire, upon a certain condition, an enlarged life interest in his wife's lands, and in estates of inheritance of which she was seised in possession during coverture, so as to extend beyond her life and continue for his own if he survives her; in other words, he may be a tenant by the curtesy.<sup>2</sup>

213. Four things are essential, at common law, to entitle a husband to curtesy. (1) A lawful marriage. (2) Seisin of the wife at some time during coverture. (3) Birth alive of issue capable of inheritance. (4) Death of the wife. After the birth of the child the husband's title to curtesy becomes possible; and the curtesy is then initiate. After the death of the wife the title to curtesy becomes complete; and the curtesy is then consummate.<sup>3</sup> Of late years tenancy by the curtesy has become practically infrequent in England by reason of the prevalence of marriage settlements excluding such

<sup>1</sup> § 201; *ante*, 98. The husband cannot by any act of his, after his wife's death affect the title to his wife's property of which he is already divested and which has vested in her heirs. 92 Ky. 109.

<sup>2</sup> Tenancy by the "courtesy," or "curtesy," is a freehold estate in the husband for the term of his natural life. He acquires it by the fact that a child capable of inheritance is born of the marriage. The meaning of the term is somewhat obscure. § 202; Washb. Real Prop. 128, and authorities cited; 2 Bl. Com. 126, and notes by Chitty and others; 2 Bright, Hus. & Wife, 116. This privilege of the husband extends to all lands and tenements of which the wife was seised at any time during coverture, whether legal or trust estate, whether in fee-simple or by way of remainder or reversion. The common law affords herein a rare but positive instance of public policy discriminating in favor of a marriage, accompanied by the propagation of children. § 201.

<sup>3</sup> § 202; 1 Washb. Real Prop. 130; Williams, Real Prop. 8th ed. 218; 4 Kent, Com. 27, 35. And see Schouler, Hus. & Wife, §§ 420-423. A tenancy by the curtesy initiate is both salable and assignable. *Briggs v. Titus*, 13 R. I. 136; *Bozarth v. Largent*, 128 Ill. 95. For a full description of curtesy, with its incidents, the reader is referred to elementary works on the law of Real Estate. Questions concerning this estate are most commonly raised, however, with reference to the second essential above stated, which applied to the wife's lands proper to the obstruction of her heirs in their immediate enjoyment, but not to lands of which she had no beneficial enjoyment, or an estate merely expectant while she lived. *Todd v. Oviatt*, 58 Conn. 174.

right; <sup>1</sup> in this country it has existed in all of the older States, but is modified in some of them expressly or by implication, by late statutes.<sup>2</sup>

**213 a.** All claims presented by the husband against his wife's real estate, after her death, in relation to such property, will be closely scrutinized.<sup>3</sup>

**214.** Concerning the wills of married women, modern legislature is quite favorable.<sup>4</sup>

<sup>1</sup> § 202; Williams, Real Prop. 187. Such exclusion by settlement should be plainly expressed in order to debar the husband. Act 1882 does not exclude curtesy as a right. (1892) 2 Ch. 336.

<sup>2</sup> See § 202. Statute provisions as to curtesy and dower are frequently alike. In various States curtesy is abolished and an estate more like that of dower given in its stead. 171 Mo. 407.

<sup>3</sup> § 203. He cannot claim reimbursement for moneys paid in settling controversies in regard to the title of his wife's real estate. 12 N. H. 362; *Burleigh v. Coffin*, 2 Fost. (N. H.) 118. And see *Warren v. Jennison*, 6 Gray (Mass.), 559. So the general rule is strict as regards his improvements upon his wife's real estate where he seeks allowance. If the husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, the presumption is that he intended the expense for his wife's benefit, and he cannot recover for it. *Campion v. Cotton*, 17 Ves. 264; 2 Fost. (N. H.) 118; *White v. Hildreth*, 32 Vt. 265; *Brevard v. Jones*, 50 Ala. 221; 16 Mass. 449; 113 Mo. 27. See 133 Penn. St. 474.

<sup>4</sup> § 203 note. And see, in detail, Schouler, *Hus. & Wife*, §§ 457-470, and appendix. So, too, as to a wife's testamentary appointment in execution of a power. *Ib.*; § 470.

The marriage of a woman was formerly deemed a revocation of her will executed while single, while marriage and the birth of a child was the rule applied to a man. Recent statutes tend to place the spouses on an equal footing in this respect; so, too, in the disability of one spouse to dispose absolutely by will to the prejudice of the other, preserving some reciprocal constraints, which is sound policy. Schouler, *Hus. & Wife*, §§ 442, 457. And see Schouler, *Wills*, §§ 424-426.



## CHAPTER XVI.

### DEATH OF THE HUSBAND; RIGHTS AND LIABILITIES OF THE SURVIVING WIFE.

215. As to the right of administration on the dissolution of a marriage by the death of the husband, the widow is usually selected, provided she be willing and competent to take the trust. But her right of administration on her husband's estate is not coextensive with that of the husband on her estate. For in the one instance the husband is to be preferred to all others; whereas, in the other, administration may be granted by the court, at discretion, either to the widow alone, or to the next of kin, or to both together.<sup>1</sup>

216. Under the English statute of distributions (22 & 23 Car. II. c. 10) the widow surviving her husband, who deceased intestate, is entitled to one third of the personal property which remains after payment of the husband's debts, while the remaining two thirds go to the children or their representatives; but if the husband leaves no lineal descendant the widow takes a moiety or half of his personal estate.<sup>2</sup> In this country

<sup>1</sup> § 204; 3 Hag. Ecc. 217. See *Ihler's Goods*, L. R. 3 P. & D. 50 (right of a widow, having lived separate from her husband); 126 Penn. St. 341; 38 N. Y. 296 (void marriage). This is the law in England, and the same prevails generally in this country, under the statutes of the different States. 2 Kent, Com. 410, 411, and notes. But various statutory changes are found. See *Mack v. State*, 63 Ala. 138; *Schouler, Executors*, §§ 99, 106, 126.

As to administration *de bonis non* of the husband's estate, see *Fairland v. Percy*, 3 P. & D. 217. And see, generally, *Widgery v. Tepper*, 5 Ch. D. 516.

<sup>2</sup> § 205; 2 Bl. Com. 515, 516; *Gurley v. Gurley*, 6 Cl. & Fin. 741; 8 Sim. 214. In certain localities of England a different rule prevails; the local customs continuing in force. 2 Bl. Com. 518. The widow's usual share is not infrequently termed her "thirds." Where there are no

the statute of Charles II. is at the basis of our legislation regarding the estates of intestates, though modifications are frequently to be met with.<sup>1</sup>

217. Some statutes permit the widow to waive a provision made for her by her husband's will, and thereupon to take such portion as the law would have given her had he died intestate; but this privilege is accorded with some restrictions as to the full amount to be allowed her.<sup>2</sup>

218. The widow's allowance is another liberal provision made by the legislatures of some American States. This is a reasonable sum, such as the court of probate may order, as necessities to the widow for herself and the family, or, if there be no widow, to the minor children. The allowance is set apart as something superior to the claims of general creditors, and is even preferred to the expenses of administration, funeral, and last illness of the husband.<sup>3</sup>

lineal descendants, the other half goes to next of kin, or (in their default) to the crown. Hence the wife's right is not coequal with that of a surviving husband. The widow of a deceased child cannot take as its representative. *Price v. Strange*, 6 Madd. 161. The husband and wife, by a marriage settlement, may exclude one another from all benefits by way of distribution in their respective estates. 2 Eden, 60; *ante*, 194.

<sup>1</sup> See 2 Kent, Com. 427, 428, and notes; Schouler, *Hus. & Wife*, § 427, and appendix. See 1 Md. Ch. 337; 78 Ill. 16; *Lines v. Lines*, 142 Penn. St. 149 (husband's rightful gifts to others during life, so that widow takes only what he leaves); 181 Mass. 458 (actual gifts).

<sup>2</sup> § 206; 2 Allen (Mass.), 468; *Towle v. Swasey*, 106 Mass. 100; *White v. Dance*, 53 Ill. 418; *Stockton v. Wooley*, 20 Ohio St. 184; *Arrington v. Dortch*, 77 N. C. 367; 51 Mo. 261; 90 Penn. St. 384; 70 Mo. 189; 52 Wis. 295. In some States the husband now has a corresponding right of waiver under his wife's will, and this seems fair. Schouler, *Wills*, §§ 424-426.

As to method of her election, see 70 Mo. 189; 6 Heisk. (Tenn.) 512. Whether such election is strictly personal, see 90 Penn. St. 384; 33 Ind. 339. And cf. local statute.

<sup>3</sup> § 207; 155 Mass. 141; Schouler, *Executors*, §§ 448-457. Marriage settlement may debar. See 194; cf. 113 Ill. 461. The amount is at the discretion of the court; and where the husband has died insolvent, leaving few assets, the whole of the personal property may be thus awarded to the widow, as an expeditious means of settling a perplexing little estate. *King v. Goodwin*, 130 Ill. 102; 16 Col. 431 (*liens not displaced*).

219. The widow's paraphernalia is a species of property recognized at the common law, though borrowed from the civilians.<sup>1</sup> The common-law doctrine of *paraphernalia* is this: that the suitable ornaments and wearing apparel of a married woman, which she had at the time of her marriage, or which come to her through her husband before or during coverture, remain his personal property during his life, and he may sell or even give them during his life; but such as remain at the time of his death belong thenceforth to her absolutely as her *paraphernalia*.<sup>2</sup>

220. Where a wife joins with her husband in executing a mortgage of her general real estate as security for his debts,<sup>3</sup> the courts have gone as far as they consistently could in upholding the wife's title under such circumstances, and in allowing her all the privileges of a surety.<sup>4</sup> In the first place,

<sup>1</sup> 2 Bl. Com. 436; *ante*, 170. See § 206, as to the origin and true significance of this term: 31 N. J. Eq. 101.

<sup>2</sup> § 206; 1 P. Wms. 730; Com. Dig. Baron & Feme; *State v. Hays*, 21 Ind. 288; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212. For the loss thereof a wife cannot sue alone, but the husband sues as for his own property. *Hawkins v. Providence R.*, 119 Mass. 596; *McCormick v. Penn. Central R.*, 49 N. Y. 303. But he certainly cannot bequeath them to his wife; nor on principle dispose of them as *donatio causa mortis*. 2 Bl. Com. 436.

*Paraphernalia* are therefore to be distinguished from the wife's separate property, inasmuch as her rights are perfected only when she becomes a widow; while the property is alienable, not by herself, but by her husband during his life. Cro. Car. 344; Com. Dig. Baron & Feme. The *paraphernalia* differ also from the wife's pin-money. *Ante*, 169. Married women's acts may, of course, render the wife's clothing, jewelry, &c., absolutely her own, and such is frequently the case at this day. 3 Bradf. Sur. (N. Y.) 277. As to what, in detail, constitutes paraphernal property, see § 206 note; 48 Me. 186.

Paraphernal property (irrespective of local statute) is liable to the husband's debts at his death like other personal assets. 21 Ind. 288; cf. *Schouler, Hus. & Wife*, § 432. As to his pawning them, see 3 Atk. 393; 31 N. J. Eq. 101.

Letters written to a wife by a former husband belong to her and not to his estate. *Grigsby v. Breckenridge*, 2 Bush (Ky.), 480. And see 64 Vt. 450.

<sup>3</sup> *Ante*, 106.

<sup>4</sup> *Ante*, 146, 161.

they favor her right to the equity of redemption as against her husband; in the second place, they allow exoneration or reimbursement from her husband's estate, after his death, where the assets prove sufficient for that purpose.<sup>1</sup>

**221. Controversies between a widow and her husband's executor or administrator** are not unfrequent; and it is manifest that at the common law the widow's situation with reference to personal property which she had brought with her into the marriage state was often extremely hard. But equity protects a restriction imposed on trust funds for her benefit, even as against her own indiscreet conduct.<sup>2</sup> A widow must not intermeddle with her late husband's estate, nor assume duties which properly devolve upon the executor or administrator.<sup>3</sup> And when representative herself of her husband's estate, she is fairly expected to enjoy the usual rights and assume the usual responsibilities pertaining to the office.<sup>4</sup>

**222. The common-law obligation of the widow to bury her deceased husband** rests upon weaker foundations than the corresponding obligation of the husband. In truth it seems somewhat inconsistent with the doctrine of coverture. Where the husband leaves an estate, the funeral expenses are to be paid by his executor or administrator, and not by his widow.<sup>5</sup>

<sup>1</sup> § 309; *Ruscombe v. Hare*, 6 Dow, 1; 1 Bli. 115; 2 Saund. 177; 1 Mod. 290; *Robinson v. Gee*, 1 Ves. Sen. 252; *Schouler, Hus. & Wife*, §§ 274, 435.

<sup>2</sup> See *e. g.* *Dunn v. Lancaster*, 4 Bush (Ky.), 581; 34 N. J. Eq. 82; *Allen v. Allen*, 80 Ala. 180; *Peacock's Trusts*, L. R. 10 Ch. D. 490. See also § 310; *Maull v. Vaughn*, 45 Ala. 184; *Cammack v. Lewis*, 15 Wall. (U. S.) 643; 140 Penn. St. 63.

<sup>3</sup> *Keating v. Condon*, 68 Penn. St. 75; *Leach v. Prebster*, 35 Ind. 415.

<sup>4</sup> See 46 Miss. 422; *Fox v. Doherty*, 30 Iowa, 834; *Moseley v. Rendell*, L. R. 6 Q. B. 338; 158 Mass. 342.

<sup>5</sup> § 311. But cf. *Chapple v. Cooper*, 13 M. & W. 252. If the husband's estate is sufficient, it ought to bear the expense of his burial. Modern policy as to family necessities may suggest a new departure; or a wife with property of her own may agree expressly to bear the charge. A woman who has paid the expenses of her late husband's final illness and funeral from her separate property, may charge the same against his estate. *McNally v. Weld*, 30 Minn. 209. See statutory liability where the wife receives the entire estate, in 78 Ind. 494. See also 108 Penn. St.

**223.** The effect of the husband's sudden death upon the wife's agency is sometimes considered. The general rule is that the authority of an attorney or agent expires with the principal; and since the wife contracts only as her husband's agent at the common law her case would seem to fall within such a doctrine.<sup>1</sup>

**224.** Dower is the law's provision for a widow out of the lands or tenements of her husband; and in its technical sense the word relates to real estate only. It applies, in fact, whenever she is the survivor, without reference to her actual circumstances as to means of support or the burden of a family. Dower extends to all estates of inheritance which the husband has held at any period of the coverture in his own right, and which any issue of hers might, if born, possibly inherit.<sup>2</sup>

247; *ante*, 153. As to possession of the dead body of the spouse for preservation and burial, modern inclination is to treat a surviving wife with much consideration. *Larson v. Chase*, 47 Minn. 307; *Hackett v. Hackett*, 18 R. I. 155, where her right of interment is maintained with slight qualifications. Such a right should not be exercised needlessly and arbitrarily. 59 N. Y. S. 810.

<sup>1</sup> See § 212, discussing *Blades v. Free*, 9 B. & Cr. 137; *Smout v. Ilberry*, 10 M. & W. 1. But the modern inclination is to relax somewhat the rigid rule, and to favor the Roman doctrine, which binds the principal or his estate in respect to acts done in good faith by his agent before notice of revocation. *Story, Agency*, §§ 488, 497. See 3 Bradf. Sur. (N. Y.) 277; *Terry's Appeal*, 55 Penn. St. 344 (wife deserted by her husband); 15 Gray (Mass.), 335; 2 South. (N. J.) 773; 1 Lans. (N. Y.) 101; 45 Ala. 343; 59 Vt. 499. See further, § 212.

<sup>2</sup> 2 Bl. Com. 130. Both dower and curtesy were long since recognized at our common law, and both have remained with very little change down to a recent date in England and America. Dower gave the widow only a life interest to the extent of one third, while curtesy gave the surviving husband the full life interest. But on the other hand, dower became absolute in the widow when she outlived her husband, while curtesy, as we have seen, never attached at all unless the husband outlived his wife and was fortunate enough to have had a child by her besides. The general rule as to descent of real estate has been that, subject to the widow's dower, the lands of a husband descend to his own heirs; while, subject to the surviving husband's curtesy, the lands of a wife descend to her own heirs; our policy being to preserve real estate in the family, so to speak, of the respective parties to a marriage, in default of issue capable of inheriting from both. § 213.

The three essentials of dower nearly correspond with those of curtesy

225. The homestead may properly be considered in connection with dower; for although this right is not strictly personal to married women, inasmuch as it exists for the benefit of both wife and children, if not for the husband besides, while he lives, it is an incumbrance upon the real estate of the husband which is generally released by the wife in connection with her dower.<sup>1</sup>

226. The simultaneous death of husband and wife is sometimes considered.<sup>2</sup>

birth of issue, as we have said, not being requisite as in the former case, and the favor to productive marriages being waived on her behalf. They are marriage, seisin of the husband, and his death. But a careful comparison of the two estates at the old law shows some inequalities. A wife or widow is not to be deprived of her dower as a rule otherwise than by her own voluntary act. 138 Ill. 43; § 213. As to dower, see in general, 1 Washb. Real Prop. 154 *et seq.*; Schouler, Hus. & Wife, §§ 445-455.

While the law of dower has been gradually fading out of sight in England, since the Dower Act, 3 & 4 Will. IV. c. 105, limiting the interest, it attains its fuller development in this country. Curiously enough, most of the modern cases on this subject are American, and they very generally favor the widow's rights. Unless the wife has joined her husband in his conveyances during his life, or statutes restrain her rights, she may usually assert the privilege at his death. But dower is found a great inconvenience in an age of commercial traffic; and legislatures show some disposition to get rid of it entirely, together with curtesy, or else to substitute equal and reciprocal interests in land. See local statutes.

<sup>1</sup> See local legislation. The homestead system is of modern origin, and exists for protection mainly against the husband's creditors. The policy on which it rests is, that a householder with a family shall always have a place of shelter where legal process cannot reach him. While open to some serious objections as concerns the rights of creditors, the homestead system is to be warmly commended in respect of the encouragement it affords to agriculture, and still more as offering rewards for domestic fidelity. § 214.

<sup>2</sup> § 214 *a*; *Bergen v. Van Liew*, 36 N. J. Eq. 637 (equal shares in a blended fund).

## CHAPTER XVII

### SEPARATION AND DIVORCE.

**227.** Separation is that anomalous condition of a married pair which involves a cessation of domestic intercourse, while the impediments of marriage continue. Such a state of things no public policy can safely favor; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or to prevent the evil; and hence it may be thought more expedient for the courts to enforce such mutual contracts of the unhappy pair as may mitigate their troubles and confer a benefit, than to dabble in a domestic quarrel and try to compel unwilling companionships.<sup>1</sup>

<sup>1</sup> § 215. Such seems to be the rightful position of our equity tribunals when they see fit to enforce separation agreements. *Id.* Deeds of separation may and must, if properly framed, be carried into execution by the courts to the extent of fair covenants. § 216; *Wilson v. Wilson*, 1 Ho. Lords Cas. 538; 5 Ho. Lords Cas. 59; 3 Mer. 255; 2 Cl. & Fin. 488. Under English legislation, not only are covenants in a separation deed enforced, but the court has power to vary them after a dissolution of the marriage. 9 P. D. 76; *Fearon v. Aylesford*, 12 Q. B. D. 539. For American cases which uphold separation deeds, see *e. g.* § 217; 4 Sneed (Tenn.), 325; 16 Md. 179; 87 N. Y. 621; 31 Cal. 273; *Walker v. Stringfellow*, 30 Tex. 570; *Hitner's Appeal*, 54 Penn. St. 110; 4 Bush (Ky.), 453; *Dutton v. Dutton*, 30 Ind. 452; *McKee v. Reynolds*, 26 Iowa, 578; *Deming v. Williams*, 26 Conn. 226; 8 Ga. 341; 16 Ohio St. 527; *Carpenter v. Osborn*, 102 N. Y. 552. But cf. *Collins v. Collins*, 1 Phill. Eq. (N. C.) 153. An agreement to separate or dissolve a marriage is contrary to sound policy. *Cross v. Cross*, 58 N. H. 373; 70 N. H. 496. And see 49 N. J. Eq. 302; 116 N. Y. 635. The distinction may, perhaps, be drawn in favor of beneficial provisions, as for the wife's support, where separation actually takes place. § 218; *Switzer v. Switzer*, 26 Gratt. (Va.) 574; *Fox v. Davis*, 118 Mass. 255; 37 Mich. 563; *Scott's Estate*, 147 Penn. St. 102; *Carpenter v. Osborn*, 102 N. Y. 552; 51 Minn. 363; 118 N. Y. 7; 166 N. Y. 627. A trustee is preferable, though not always

228. Reconciliation and a renewal of cohabitation will put an end to all provisions of a separation deed whose scope relates to a state of continuous separation merely, and the rights and interests of each in the other's property will be resumed by inference as of the usual marital status.<sup>1</sup>

229. As to the right of the wife, when abandoned by her husband, to earn, contract, sue, and be sued, to much the same effect as a *feme sole*, while such abandonment actually lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine.<sup>2</sup>

insisted upon. § 218; 37 Mich. 563; 41 Miss. 119. If separation never took place, the deed is void. L. R. 13 Eq. 511. But equity will not interfere against executed provisions. See 78 Iowa, 177; 113 N. Y. 427.

If some covenants in such a deed are legal and proper, while others are not, the former are enforceable by themselves. *Hamilton v. Hector*, L. R. 13 Eq. 511. See as to miscellaneous conditions, *ib.*; 31 Gratt. 52 (provision of indemnity); (1897) 2 Q. B. 547 ("not to molest"). In England, separation deeds have received more favor than in this country; and partly because divorce is less favored. For legalization by statute, see *Besant Re*, L. R. 11 Ch. D. 508 (custody of children provided for). See also, as to the English restitution of conjugal rights (unknown in the United States) § 218 and note.

<sup>1</sup> *Nicol v. Nicol*, 31 Ch. D. 524; *Knapp v. Knapp*, 95 Mich. 474. Even where the matrimonial resumption is not on the full footing of cohabitation. *Zimmer v. Settle*, 124 N. Y. 37. Reconciliation contracts aided. *Barbour v. Barbour*, 49 N. J. Eq. 429. But cf. 78 Iowa, 177. But transfers may be upheld. *Phillips v. Culliton*, 153 Mass. 17; *Burkholder's Appeal*, 105 Penn. St. 31. See as to the offer by one party to return, *Farber v. Farber*, 64 Iowa, 362. And see 54 W. Va. 171.

A separation deed affords no bar to a legal divorce for causes subsequently arising; nor for damages against the offending spouse. *Izard v. Izard*, 14 P. D. 45. See 116 N. Y. 635.

<sup>2</sup> See 6 Pick. (Mass.) 89; 1 Ohio St. 403; *Spier's Appeal*, 2 Casey, 233; 15 Ala. 141; *Rhea v. Rhenner*, 1 Pet. (U. S.) 105; *Moore v. Stevenson*, 27 Conn. 14; § 219. And see the various statutes in almost every State in the Union, enlarging the rights of married women in such cases. 22 W. Va. 708; *Phelps v. Walther*, 78 Mo. 320; 78 Me. 215; 69 Iowa, 641; 128 Ind. 150 (crops applied). And see Stat. 20 & 21 Vict. c. 85; 10 C. B. n. s. 179. Chancery has long moulded its proceedings to secure a like privilege. The test is whether the husband may be deemed to have renounced his marital relation. 47 Me. 217.

The great contrariety of current legislation is an obstruction to formulating a decided rule of English and American jurisprudence on this point.



230. Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same grounds. On two points only do English and American jurists seem to agree: (1) that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; (2) that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.<sup>1</sup>

Under the old common-law doctrine of coverture, the wife could not sue or be sued, or otherwise act as a single woman, unless the husband was under the disability of a civil death, which meant originally banishment or abjuration of the realm; *ante*, 59. The wife's rights being enlarged by statute under such circumstances, such legislation is to be considered as grafted upon the common law of coverture; and the first decided innovation of the "married women's acts," enlarged the wife's scope in case of her abandonment. § 219. See *Wolf v. Banereis*, 72 Md. 481 (wife, when abandoned, to sue for her personal injuries). And see separate maintenance. Schouler, *Hus. & Wife*, §§ 485, 487.

<sup>1</sup> Upon divorce causes and divorce procedure, see Schouler, *Hus. & Wife*, Part IX.; also Bishop, *Mar. & Div.*, 2 vols. *passim*. The ancient nations, all recognizing the necessity of some divorce legislation, differed in their method of treatment. Among the Greeks, the marriage institution was degraded; the husband could send away his wife, and the wife could leave her husband; the procedure in either case being quite simple. Ancient Rome was built on family discipline, rather than domestic love; the husband exercised full sway, and the stately and severe Roman matron disappeared entirely in the later dissolute and corrupt years of the Roman Empire. See the cause of Rome's decay, which Horace divines, in *Carm. Lib. iii*; and see Woolsey, *Div.* 31, 41. The ideal of marriage among the Hebrews was high: that husband and wife should cleave together and be one flesh; nevertheless, the usage of this nation, founded upon the Mosaic code, seems to have permitted the husband to dismiss his wife at pleasure. The Christian influence and teaching has been to condemn all arbitrary exercise of power in this respect, to place man and woman on more nearly an equal footing, to discourage all lax and temporary unions, and to warn the legislator that those whom God hath joined man may not with impunity put asunder. § 230.

There is a growing and dangerous laxity in the United States as to the permanency of the marriage relation. One difficulty is our universal

231. Divorce may be granted from bed and board or from the bonds of matrimony by the prevailing English and American practice. The former,<sup>1</sup> which is a sort of judicial separation, applies to the less heinous offences, wherever a legislature recognizes any distinction at all; while the latter,<sup>2</sup> which alone is complete, is the remedy for the greater offences, or perhaps for adultery only. The one is partial divorce or a legalized separation; the other is final and full divorce.<sup>3</sup>

231 a. To briefly advert to the chief causes of divorce recognized by our modern legislation. (1) *Adultery* is the cause of divorce most universally commended: a plain offence, and one which involves conjugal unfaithfulness at the most vital part of the marital relation. By adultery we mean the voluntary sexual intercourse of either married party with some one, married or single, of the opposite sex, other than the offender's own spouse.<sup>4</sup> (2) As for *cruelty*, this cause of divorce is designed regularly for the vindication of the tendency to greater social freedom, freedom as between the sexes, woman herself pressing for it; another the existence of so many independent jurisdictions, which enable our citizens travelling from one State to another to find facilities for divorce and remarriage always at hand. Uniformity by consent among these jurisdictions, or else a national rule by constitutional amendment, seems desirable. § 230. Schouler, Hus. & Wife, §§ 499, 500.

<sup>1</sup> *A mensa et thoro*.

<sup>2</sup> *A vinculo*.

<sup>3</sup> § 230 a. Local codes should be carefully studied on this point, as they differ in policy. Many causes for annulling a marriage are in these days somewhat loosely specified in local codes as causes of divorce. See *ante*, 14.

Divorces *nisi* are sometimes decreed, being in the nature of a partial and not final divorce, so as to afford delay for remedying error or allowing a last chance for reconciliation before a complete divorce *a vinculo* is granted. Specific performance of marriage is unenforceable in this country, even by way of penalty or by requiring a bond. § 230 a; Schouler, Hus. & Wife, §§ 504-506; 7 Mass. 474; 42 Mich. 267; *Mordaunt v. Moncrieffe*, L. R. 2 H. L. Sc. 374.

<sup>4</sup> Adultery justifies divorce from bond of matrimony under most codes; and while the English statute has been somewhat partial to a husband who sins without otherwise offending his wife or without atrocious accompaniments of the crime, American policy treats both sexes alike, and visits the guilt of husband or wife alike.

weaker party, usually (but not necessarily) a wife, whose wrong here from her husband may be found actually greater than from his silent infidelities.<sup>1</sup> (3) *Desertion*, or the wilful abandonment of one spouse by the other, was not a recognized cause of divorce under the early ecclesiastical law as promulgated at the settlement of this country; but desertion for a specified period has long been a permitted statutory cause for divorce in this country as it now also is in England.<sup>2</sup>

232. Various other causes of divorce are specified from time to time by local statute, with much variety of verbal expres-

<sup>1</sup> In general, wherever the conduct of one spouse to the other is such that the latter cannot continue cohabitation without reasonable ground for fearing such bodily harm from the former as seriously to obstruct the exercise of marital duties, or render the conjugal state unendurable, there legal cruelty exists, and cause for divorce; and from this point of view violence actually committed and violence threatened, if with sinister intention, are alike reprehensible. § 220 *b*; Schouler, *Hus. & Wife*, § 507 *et seq.*; 1 Hag. Con. 35; *Latham v. Latham*, 30 Gratt. (Va.) 307; 25 N. J. Eq. 526; 23 Ore. 226; 118 Ga. 183 (morphine habit not enough); cf. 109 Iowa, 401.

Legislative enactments use various expressions, some of which stop short of the extremity of cruelty; *e. g.*, "excesses," "outrages," "intolerable indignities," &c. And see such phrases as "cruel and inhuman," "cruelty of treatment," "extreme and repeated cruelty," &c. For decisions, see § 220 *b*; 62 Tex. 518 (false charges of unchastity); 33 Kan. 1; 30 Kan. 712; 18 Nev. 49; 67 Tex. 198 (public). Chastisement of the wife is cruelty, and certainly when repeated; 65 Md. 104 (chastisement); 21 Fla. 571; *supra*, 47; 56 Mich. 50 (wanton neglect in critical illness); 121 Mich. 236.

<sup>2</sup> Schouler, *Hus. & Wife*, §§ 515-523; *Pape v. Pape*, 20 Q. B. D. 76; 33 N. J. Eq. 363. Note the varying language of local codes on this subject: "wilful desertion," "abandonment," "wilful absence," &c. The time specified varies from one to five years; three years being, perhaps, the fair average. See 11 P. D. 111 (neglect to comply with a decree for restitution). Three things are usually imported in this legal desertion: an actual cessation of cohabitation for the period specified; the wilful intent of the absent spouse to desert; desertion by that spouse against the will of the other. *Sergeant v. Sergeant*, 33 N. J. Eq. 204; 47 N. J. Eq. 210, 349; *Latham v. Latham*, 31 Gratt. (Va.) 307; *Morrison v. Morrison*, 20 Cal. 431; 141 Mass. 495; (1899) Prob. 221, 278 (misconduct forcing the other out); 194 Penn. St. 419. There is no cause of divorce in which the collusion of a discontented pair is more likely to prevail, unless the court is quite circumspect, than this alleged desertion.

sion; these are for the most part modifications of the three chief ones we have just enumerated. For with few exceptions, all causes of divorce have one or more of the three leading elements present: there is adultery or cruelty or desertion; or, to speak less literally, sexual infidelity, maltreatment, or the wrongful cessation of marital intercourse.<sup>1</sup>

<sup>1</sup> § 230 *b*. (a) Among specified offences akin to adultery are sodomy and bestial crimes against nature, concubinage, and habitual loose intercourse with persons of the opposite sex. 8 R. I. 557; 32 Wash. 400; 10 Ire. (N. C.) 506. See 9 Kulp (Penn.), 369. (b) In the nature of cruelty is, offering indignities to the person of a spouse, conviction of felonious crime (which, besides separation, visits disgrace upon the innocent), gross and confirmed habits of intoxication or habitual intemperance, gross neglect of duty, abusive treatment. As to appeal, etc., from a conviction and imprisonment, cf. 60 Iowa, 378; 58 N. H. 152. And see 44 Minn. 132 (intemperance). (c) Joining the Shakers (among whom the relation of husband and wife is held unlawful), absenting one's self unreasonably long, — causes like these are in the nature of desertion; and insanity, withholding sexual intercourse, and various other causes not clearly recognized as justifying divorce, are of a like nature. See (1900) Prob. 180; 75 Vt. 432; 136 Cal. 195 (code). In some instances it might be hard to say whether cruelty or desertion is the stronger element. § 230 *b*. But other miscellaneous causes of divorce may be found specified in American codes: some mingling fraud and other nullifying causes as grounds for a divorce; some again permitting divorce to be granted at judicial discretion for any other cause, or upon general considerations of the peace and morality of society, — a dangerous latitude should any court choose to abuse its functions. § 230 *b*; 31 Me. 590. The perverted intent of a transgressing spouse does not affect such remedy. 74 Tex. 414.

For divorce procedure, see, at length, Schouler, *Hus. & Wife*, §§ 533–556; 2 Bishop, *Mar. & Div. passim*. Among the permitted defences, besides that of assailing the libellant's proof, is recrimination (since the party alleging a wrong must come into court with clean hands), condonation (or conditional forgiveness), connivance (or aiding and abetting the offence, usually from corrupt and sinister motives, so as to make out a case for divorce). Cross-bills are often filed, each party seeking divorce for the other's fault. Condonation of a spouse's adultery does not debar from divorce if such spouse afterwards commits adultery. 135 Mass. 386. And see (1898) Prob., 228; 93 Md. 298. For the Scotch law of condonation, see *Collins v. Collins*, 9 App. Cas. 205. As to connivance at a wife's adultery which debarred a divorce, see 136 Mass. 310. On the decree for dissolution of marriage becoming absolute, it takes effect from the date of the decree *nisi*. L. R. 3 Ch. 220.

233. The effect of absolute divorce upon the property rights of married parties is substantially that of annihilation of the status. We speak here of *bona fide* and valid and complete decrees of dissolution.<sup>1</sup> This is a topic upon which the common law, from the infrequency of divorce, furnishes no light, except by analogies; but modern statutes frequently regulate the subject locally.<sup>2</sup>

234. Divorce from bed and board, or *nisi*, produces, however, no such sweeping results; the cardinal doctrine here being

<sup>1</sup> See invalid decree disregarded in *Cheely v. Clayton*, 110 U. S. 701. And see 181 U. S. 175; *Andrews v. Andrews*, 188 U. S. 14. Cf. 172 N. Y. 65.

<sup>2</sup> § 231; 111 Mass. 209; L. R. 1 Ch. D. 563; L. R. 7 H. L. 854; L. R. 2 Ch. D. 318; L. R. 2 P. D. 256 (statute power to modify a marriage settlement). In general, all transfers of property actually executed before divorce, whether in law or in fact, remain unaffected by the decree. 27 Miss. 680 (choses already reduced to possession); 154 Mass. 596 (executed settlement); 58 Ga. 86; 111 Mass. 209; *Jackson v. Jackson*, 91 U. S. 122; 107 Ind. 400; 54 Md. 85 (gift by wife previously). But as to rights dependent on marriage and not actually and fully vested, a full divorce *a vinculo* ends them; as *e.g.* curtesy, dower, the right to reduce choses prospectively into possession, rights of administration, and distributive property rights. See local codes; 17 Mo. 87; 27 Me. 112; 10 Conn. 225; 24 N. J. Eq. 440; 61 Mo. 148; 10 Ohio St. 596. But see 103 N. Y. 284. As to property of the husband in the divorced wife's possession, see 76 Me. 521. As to community property, see 59 Tex. 54; 60 Cal. 579. As to estate by the entirety, see 92 Tenn. 695. A divorce *a vinculo* obtained by the wife, though for the husband's misconduct, bars dower. 24 N. J. Eq. 440; 81 Ill. 465 (substitute for dower). And see 51 N. H. 405; 61 Mo. 148. Cf. statute construed in 64 N. Y. 47; also in 44 Ohio St. 645. And see 114 Ill. 375; 6 Gray (Mass.), 157 (torts). As to will, see 95 Mich. 16 (implied revocation).

See further, as to the effect of divorce, Schouler, *Hus. & Wife*, § 561; 2 Bishop, § 725.

Upon that principle of sound policy which maintains inviolate the sanctity of the marriage union, while further discouraging stale and doubtful litigation to which their final and angry rupture might incite one of the married parties, a divorced wife cannot maintain an action against her divorced husband upon torts or a stale implied contract arising during coverture. 4 Ore. 298; 67 Me. 304; 84 Me. 82. Such remedies, so far as available at all, ought to be sufficiently available at the time the right accrued and during marriage. And see 135 Mass. 393; 91 Ky. 497. But *semble* the husband may be sued in contract upon mutual transactions of legal force during the marriage state. 84 Me. 82.

that the marriage remains in full force, although the parties are allowed to live separate. Here, too, we must consult the phraseology of local statutes with especial care in order to determine the respective rights and duties of the divorced parties.<sup>1</sup>

<sup>1</sup> § 223; L. R. 1 Eq. 470; 5 Pick. (Mass.) 461; *Castlebury v. Maynard*, 95 N. C. 281; 6 W. & S. (Penn.) 85; 5 Met. (Mass.) 320. Cf. 4 Barb. (N. Y.) 295 (chancery interference). As to the wife's right to sue and be sued, etc., on the footing of a *feme sole*, see § 223; 6 W. & S. (Penn.) 85.

## PART III.

### PARENT AND CHILD.

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#### CHAPTER I.

##### OF LEGITIMATE CHILDREN IN GENERAL.

**235.** Parent and child is a relation which results from marriage, and is, as Blackstone terms it, the most universal relation in nature.<sup>1</sup> Both natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity.<sup>2</sup> Children are divided into two classes, legitimate and illegitimate. The law prescribes different rights and duties for these classes.<sup>3</sup> It becomes proper, then, to consider them in order.<sup>4</sup>

**236.** A legitimate child is one who is born in lawful wedlock, or is properly brought within the influence of a valid marriage by reason of the time of birth. Legitimacy, as the word imports, will require that the child be born in a manner approved of by the law.<sup>5</sup> Cohabitation and common repute raise the presumption of lawful wedlock sufficiently to dispense, ordinarily, with positive proof of a marriage.<sup>6</sup>

<sup>1</sup> 1 Bl. Com. 447.

<sup>2</sup> § 233. This is the most disinterested, perhaps, of the family relations.

<sup>3</sup> 1 Bl. Com. 447.

<sup>4</sup> To legitimate children alone the relation in strictness applies. § 233; 127 Ill. 554.

<sup>5</sup> § 234. If he is begotten during marriage and born afterwards, it is enough; and so, too, if he was begotten before marriage but born in lawful wedlock.

<sup>6</sup> §§ 25-29, 234; 127 Ill. 554.

237. Every child born in wedlock is presumed to be legitimate, and the child's paternity is provable by reputation. Hence the burden to show illegitimacy is cast on those who allege it in such cases.<sup>1</sup>

238. In respect of the legitimation of offspring by the subsequent marriage of their parents, the civil and common-law systems widely differ. By the civil and canon laws, two persons who had a child as the fruit of their illicit intercourse might afterwards marry, and thus place their child to all intents and purposes on the same footing as their subsequent offspring, born in lawful wedlock.<sup>2</sup> But the common law, though not so strict as to require that the child should be begotten of the marriage, rendered it indispensable that the birth should be after the ceremony.<sup>3</sup> The English law still continues strongly

<sup>1</sup> § 225. And see civil law maxim cited and approved *ib.*; 1 Burge, Col. & For. Laws, 60; 1 Bl. Com. 447. See Stra. Rep. 925; 13 Ves. 56, as to overcoming such presumption. This presumption of legitimacy was once carried to an absurd excess in English law; but the better opinion at this day is, that it may be overcome by clear proof of non-access on the husband's part and that the facts must be left to the jury or triers of a case for determination. 2 Kent, Com. 211; § 225; 12 App. Cas. 312; Blackburn v. Crawfords, 3 Wall. (U. S.) 175; 1 Sim. & Stu. 150, 153; Fox v. Burke, 31 Minn. 319; Watts v. Owens, 62 Wis. 512; 137 Cal. 298; Orthwein v. Thomas, 127 Ill. 554; 191 Ill. 424; Morris v. Davies, 5 Cl. & Fin. 463; 12 P. D. 177; 6 How. (U. S.) 582; 1 Allen (Mass.), 209; 15 Ga. 160; 1 S. C. n. s. 85. Whether husband or wife may testify as to access or non-access, see § 225: Warlick v. White, 76 N. C. 175; Jackson v. Jackson, 80 Md. 176 (declaration of deceased); Janes's Estate, 147 Penn. St. 527; 83 Me. 23 (adulterer); Shuman v. Shuman, 83 Wis. 250; 85 Va. 245; 89 Ky. 318.

<sup>2</sup> § 226; 1 Burge, Col. & For. Laws, 92; [1894] App. Cas. 165.

<sup>3</sup> 1 Bl. Com. 454. As to a child born after the ceremony, even though it be but a few weeks later, see Gardner v. Gardner, 2 App. Cas. 723. Cf. *In re Corlass*, 1 Ch. D. 460. It appears that the law of legitimation *per subsequens matrimonium* is of Roman origin; introduced and promulgated by the first Christian Emperor, Constantine, as history alleges, at the instigation of the clergy. This was an innovation upon the earlier Roman system; and the object of its introduction was to put down that matrimonial concubinage which had become so universal in the Empire. Cod. lib. 6, tit. 57. Justinian afterwards made this law perpetual. Fraser, Parent & Child, 32; 1 Burge, Col. & For. Laws, 92, 93. Its first appearance in the canon law is found in two rescripts of Pope Alexander III.,



opposed to the whole doctrine of legitimation by a subsequent marriage or any other means.<sup>1</sup>

239. As to the status of children born after divorce, partial or complete, little can be stated from the books; for such divorces hardly existed at the common law. They are probably illegitimate *prima facie*, if born of the divorced mother within an unreasonable time after separation.<sup>2</sup>

240. The issue of marriages rendered null and void are on general principles necessarily illegitimate.<sup>3</sup> This subject is regulated by statute to a great extent in this country; and here again our American system conforms to the civil rather than the common law.<sup>4</sup>

preserved in the Decretals of Gregory, and issued in 1180 and 1172. Fraser, Parent & Child, 33. These extended the benefits of the marriage to the offspring of carnal love, and not merely to the issue of systematic concubinage. This law of legitimation was introduced into Scotland within the range of authentic history. It is also admitted, with different modifications, into the codes of France, Spain, Germany, and most other countries in Europe. § 226. The true policy of such a rule is justice and peace to those concerned, and most of all to the innocent offspring. Hence legislation in many American States has sanctioned the doctrine. § 226 and cases cited; Stimson, Stat. Law, §§ 6631-6634. Legitimation of bastard offspring by a parent's written declaration formally recorded is also permitted in some States. *Ib.*; 45 Ala. 410, 414; 28 La. Ann. 3; 31 Cal. 359. And see 31 Iowa, 296; 135 Cal. 385 (with wife's consent). There is no legal presumption that a man who marries the mother of a bastard child was its actual father; and some recognition of paternity or else an adoption is a usual element in intermarriages of this sort. *Janes's Estate*, 147 Penn. St. 527; *Brewer v. Hamor*, 83 Me. 251; 81 Cal. 408.

<sup>1</sup> § 227; 1 Bl. Com. 454, 455. The English bishops, in the reign of Henry III., unanimously refused to change the church law in that respect. *Ib.* And see *Lapsley v. Grierson* (1848), 1 Cl. & Fin. n. s. 498; 7 Cl. & Fin. 895. Cf. *Bussom v. Forsyth*, 32 N. J. Eq. 277 (exception at common law). But see c. 6, *post*, as to increasing favor shown to bastards.

<sup>2</sup> § 227 a; 3 Barb. Ch. (N. Y.) 132; 1 Salk. 123. A remarriage by a divorced party in a State or country where such marriages are not prohibited will make the offspring of such remarriage legitimate in spite of local prohibitions where the divorce was decreed. *Moore v. Hegeman*, 92 N. Y. 521.

<sup>3</sup> § 228. But opposed to this is the canon-law doctrine of a putative and *bona fide* marriage. *Ib.* See 1 Cl. & Fin. n. s. 498; Fraser, Parent & Child, 23, 24; 106 La. 494.

<sup>4</sup> § 228. And see *Graham v. Bennett*, 2 Cal. 508.

241. Legitimation by the State or Sovereign authority has been claimed or perhaps exerted.<sup>1</sup>

242. The domicile of a child's origin, or the domicile at any time of his minority, is to be determined by the domicile of his parents; or, to speak more strictly, of his father, if the latter be alive and not legally deprived of his paternal rights. We speak at this time only of legitimate or of legitimated or adopted children.<sup>2</sup> The domicile of origin remains until another is lawfully acquired. And since minors are not *sui juris*, they cannot change their domicile during their minority, though they may when of full age; hence they retain during infancy the domicile of their parents; if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children.<sup>3</sup> This question of domicile may be of importance in determining the grant of administration on a deceased infant's estate or if the child be alive, of his guardian's appointment.<sup>4</sup> The rule of

<sup>1</sup> § 239; 1 Bl. Com. 459 (as to English Parliament); *Beall v. Beall*, 8 Ga. 210; *Vidal v. Commajere*, 13 La. Ann. 516. It will be presumed that a statute of this kind confers legitimacy only so far as to give the capacity to inherit. *Grubb's Appeal*, 58 Penn. St. 55. As to constitutional restraint against impairing the obligation of contracts, *quære*.

<sup>2</sup> The rule for natural-born children of wedlock applies to children legally adopted, except that the child's domicile in this latter case is that of the adopting parent at the time of adoption. *Van Matre v. Sankey*, 148 Ill. 536; *Woodward v. Woodward*, 87 Tenn. 644.

<sup>3</sup> § 230; 23 Pick. (Mass.) 170; *Taylor v. Jeter*, 33 Ga. 195; *Daniel v. Hill*, 52 Ala. 430. The husband's home, chosen at his due discretion, is the legal domicile of his wife and young children. 92 Cal. 653; *ante*, 39.

Concerning the surviving mother's right to change *bona fide* the domicile of her minor children, see 3 Mer. 67; 2 Bradf. Sur. (N. Y.) 214; *Carlisle v. Tuttle*, 30 Ala. 613. The widow's removal from the homestead must not prejudice the children's claim thereto. *Showers v. Robinson*, 43 Mich. 502. After a mother remarries, the domicile of the child ceases to change, and does not follow that of the stepfather. 40 N. Y. Super. (N. Y.) 347. A female infant cannot change her own domicile, even for the purpose of annulling her marriage. *Blumenthal v. Tannenholz*, 81 N. J. Eq. 194. No child can, while an infant and not *sui juris*, acquire a new domicile. 2 Bradf. (N. Y.) 214; 73 Me. 108 (even if emancipated).

<sup>4</sup> Following the usual rule, the real estate, even of children, descends

a minor's citizenship corresponds; and where the parent removes to another State or country, the minor child's citizenship changes, though he be temporarily left in the former jurisdiction.<sup>1</sup>

**243.** By adoption a quasi parental relation is constituted, in the taking or choosing of another's child as one's own.<sup>2</sup> Adoption was not possible by our old common law; but in many States it is now permitted, and the mutual rights of the parent and child by adoption are treated substantially as those in the natural relation.<sup>3</sup> The consent of the natural parent or existing custodian is usually requisite unless the reasons for dispensing with it are strong and judicially considered,<sup>4</sup> and according to the law of *situs*, and the personal according to the domicile.

*Prima facie*, the infant's residence or domicile is that of his parent, and such it will remain during minority, in spite of his temporary absence at school or elsewhere. But his domicile may be changed by his father, if he has one; otherwise, according to the best modern authorities, by the surviving mother until her remarriage; and perhaps even by the guardian himself, although not a relative, provided he act in good faith. The intent of the parent or guardian in such cases is always material; but this intent is to be determined by facts. § 230. See further as to guardian, *post*, Part IV, c. 5.

<sup>1</sup> Concerning the conflict of laws as to domicile and legitimacy in case of an infant, see § 231 and cases cited; Story, *Conf. Laws*, § 105; Wharton, *Conf. §§* 35, 41. See also § 232 note, as to the conflict of laws regarding a marriage; *Boyd v. Nebraska*, 143 U. S. 135; 49 Fed. 257.

<sup>2</sup> Inst. I. 11, 1; Bouvier, *Law Dict.* "Adoption."

<sup>3</sup> § 232; 115 Mass. 262; 18 La. Ann. 516; 40 Vt. 501; 25 Ga. 612; Stimson, *Stat. Law*, §§ 6640-6651; 88 Penn. St. 346; 162 N. Y. 635.

An adopted child usually inherits from the adopting parent, and *vice versa*, the natural parent being excluded in preference. 95 Ind. 1; 100 Ind. 274, 369, 422; 73 Me. 25 ("children"); 53 Wis. 514 (real estate); 115 Mass. 262 ("issue" but not "heir of body"); 67 Tex. 200. But cf. 26 Tex. 516; 148 Mass. 619 (adoption of a grandson).

The adopting parent should support and is entitled to the minor child's custody and services. 91 Ala. 295; 98 Ala. 342. The adopting parent retains the usual right of disposing by will, as in the case of natural offspring. 99 Mo. 478; 112 Mass. 384. But cf. 37 La. Ann. 839. An adopted child's domicile changes during minority with that of the adopting parent on the usual principle. 3 Pickle (Tenn.), 644.

<sup>4</sup> 37 N. J. Eq. 245; 44 Iowa, 863; 80 Cal. 216 (consent of an orphan asylum). And see 86 Wis. 81; 87 Cal. 638; 154 Mass. 378 (guardian of

the method of adoption in jurisdictions which permit it is pointed out by local law.<sup>1</sup>

illegitimate child, but not father). Release of parental authority is not revocable at pleasure. 54 Ga. 9.

<sup>1</sup> 53 Iowa, 146 (recorded instrument); 64 Iowa, 71; 53 Vt. 9; 98 Cal. 531; 89 Penn. St. 358 (judicial decree); 137 Mass. 84, 346.

A statute making an adopted child legally the child of the parents by adoption is not unconstitutional unless interfering with vested rights. *Sewall v. Roberts*, 115 Mass. 262. As to comity, see 129 Mass. 243; 148 Ill. 536; 124 Mass. 592. See further, 68 Mo. 482; 137 Mass. 84, 346; 101 Ind. 340; 53 Vt. 619 (adoption by a husband without his wife's consent); 87 Ind. 590; 71 N. H. 483.

Adoption relates usually to minors alone. 14 R. I. 38. But not always. 52 S. W. (Mo.) 377. Whatever be the mode prescribed by the legislature, this procedure should conform carefully, as in derogation of the common law. 44 Iowa, 363 (equity cannot dispense); 153 Mo. 479; 184 Ill. 86.

Under the Roman civil law consanguinity was not, as our English common law regards it, an essential basis to the filial relation; for infants were exposed to death, and indifference to blood offspring, as well as to the ties of lawful wedlock, characterized the law of family in the decaying age of the Empire. Adoption was a convenience, however, even thus, for the transmission of wealth and titles; and by adoption, moreover, we find an unfruitful couple at the present day, and in our own country, grafting the tree, in obedience to the best of parental instincts. § 234. The adoption of illegitimate offspring was one method of legitimating subsequently at the civil law, thus dispensing with the parental marriage. *Ante*, 240; 96 Cal. 533.

## CHAPTER II.

### THE DUTIES OF PARENTS.

**244.** Three leading duties of parents as to their legitimate children are recognized at the common law: (1) to protect; (2) to educate; (3) to maintain them. These duties are all enjoined by positive law; yet the law of the natural affections is stronger in upholding such fundamental obligations.<sup>1</sup>

**245.** (1) Protection is that cover or shield, personal and legal, from evil and injury which the stronger owes to the weaker; and especially does the father owe this to his child, so long as the latter remains comparatively helpless. The obligation may be shifted in time, as age adds to the strength of the one and the infirmities of the other.<sup>2</sup> The natural duty of protection is rather permitted than enjoined by any municipal laws; nature in this respect "working so strongly," to use the forcible words of Blackstone, "as to need rather a check than a spur."<sup>3</sup>

**246.** (2) The second duty of parents is that of education; a duty which Blackstone pronounces to be far the greatest of all these in importance.<sup>4</sup> The English courts of chancery

<sup>1</sup> § 233; 1 Bl. Com. 447; 2 Kent, Com. 189.

<sup>2</sup> § 234.

<sup>3</sup> § 1 Bl. Com. 450. See 1 Hawk. P. C. 83, cited here, 1 Bl. Com. 450. Blackstone's illustration is not a happy one, but it shows that our common sympathies are with him who defends his own offspring. A parent may maintain and uphold his children in their lawsuits, without being guilty of maintaining quarrels. 2 Inst. 564. But cf. *Hill v. Childress*, 10 Yerg. (Tenn.) 514. He may also justify an assault and battery committed in defence of their persons. 1 Hawk. P. C. 131; 1 Bl. Com. 450. The doctrine of parental protection seems to have required little or no special judicial discussion in modern times.

<sup>4</sup> 1 Bl. Com. 450. This importance is enhanced by the consideration that the usefulness of each new member of the human family to society

have exercised considerable jurisdiction over the education of minor wards: a topic which seldom engages the attention of American tribunals.<sup>1</sup>

depends chiefly upon his character, as developed by the training he receives in early life. § 235. Government interferes, and justly, too, both to aid the parent in giving his children a good education, and in compelling that education, where the parent himself is delinquent in improving the opportunities offered. *School Board v. Jackson*, 7 Q. B. D. 502.

<sup>1</sup> Particularly as to parental direction by will, etc., in religious education. § 235; 2 Myl. & Cr. 34; 7 El. & Bl. 186; *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539. While the penal laws against Roman Catholics were in full force in England, it was considered the duty of the court of chancery, by analogy to the statute law, to see that all infants under its control should be brought up in the Protestant religion. *Macphers. Inf.* 123-141; 9 Mod. 40; 2 P. Wms. 5. With the progress of religious toleration came a different rule of practice; but schemes of education, in cases of disagreement, are still prescribed. *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539; *Clark, Re*, 21 Ch. D. 817. See *Campbell v. Mackay*, 2 Myl. & Cr. 34; *Tremain's Case*, Stra. 168; *Hall v. Hall*, 3 Atk. 721. In *Tremain's case*, an "infant" went to Oxford contrary to the orders of his guardian, who wished him to study at Cambridge. The court sent a messenger to carry him from Oxford to Cambridge; and upon his repeated disobedience there went another *tam* to carry him to Cambridge, *quam* to keep him there. Courts of chancery, in short, take jurisdiction to superintend the education of infant children. Yet their disposition has been to merely carry out a father's wish or the prevailing public policy. § 235. As between Protestant and Roman Catholic education, or atheism, see *Agar-Ellis v. Lascelles*, L. R. 10 Ch. D. 49; *Besant, In re*, L. R. 11 Ch. D. 508. And see L. R. 4 P. D. 87; 40 Ch. D. 200; 24 Ch. D. 817.

There appears no leading American case decided on strict common law or chancery grounds with direct and sole reference to the education of young children. But there are late decisions concerning the right of public school boards to issue general regulations concerning the admission, suspension, or dismissal of pupils, or the subjects of study. *People v. Board of Education*, 18 Mich. 400; 31 Neb. 552 (father's right to make a reasonable selection from the studies prescribed). See further, *Burdick v. Babcock*, 31 Iowa, 562; *Hodgkins v. Rockport*, 105 Mass. 475; 77 Mich. 605; 74 Wis. 48; 59 Conn. 489; 129 Ind. 14. As to religious instruction and the use of the Bible, see *Hysong v. School District*, 164 Penn. St. 629; *State v. District Board*, 76 Wis. 177. Separate schools for white and colored children rightfully established. 103 Mo. 546.

247. (3) The third parental duty is that of maintenance. It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced. So well secured is the obligation of maintenance that it seldom requires to be enforced by human laws.<sup>1</sup> Maintenance is that support which one person gives to another for his living; and this word, used by common-law writers, corresponds with the civil-law term "aliment."<sup>2</sup> The obligation on the parent's part to maintain the child continues until the latter is in a condition to provide for his own maintenance; and it extends no further, at common law, than to a necessary support.<sup>3</sup>

248. The English statute 43 Eliz. c. 2,<sup>4</sup> points out the English policy in this respect.<sup>5</sup> This statute may be considered as having been transported to the United States as part of our common law. Its provisions have also been re-enacted in many of our States, with occasional modification.<sup>6</sup> In general, the legal obligation of the father to maintain his child under the common law ceases as soon as the child is of age, however

<sup>1</sup> § 236. The duty of maintenance is laid on the parents, not only by Nature herself, but by their own proper act in bringing the children into the world. By begetting them, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. Puff. Law of Nations, b. 4, c. 11; 1 Bl. Com. 447.

<sup>2</sup> § 236.

<sup>3</sup> 2 Kent, Com. 190; 1 Bl. Com. 448.

<sup>4</sup> Slightly amended by 5 Geo. I. c. 8.

<sup>5</sup> 1 Bl. Com. 448; *Stubb v. Dixon*, 6 East, 166; *Macphers. Inf.* 210. These statutes did not extend to illegitimates or step-children. 4 T. R. 118; 4 East, 76; 32 Wash. 294. But this is changed in England by statute 4 & 5 Will. IV. c. 76. § 237. The policy of this enactment was largely for keeping the feeble and disabled from becoming a public charge, while there were parents, grandparents, or others able to keep them from starvation. See *Wellesley v. Duke of Beaufort*, 2 Russ. 23, per Lord Eldon; 6 Ad. & El. 301. Cf. 1 Bl. Com. 449.

<sup>6</sup> 2 Kent, Com. 191, and notes. See such local statutes in detail. 4 N. H. 162; 25 Ind. 174; *Farnham v. Pierce*, 141 Mass. 203 (custody of neglected child changed); 36 N. H. 271. An adult child is conversely compelled, if able, to support his feeble and indigent parent, as such statutes frequently provide. 34 Mich. 58; *Dierkes v. Phila.*, 93 Penn. St. 270.

wealthy the father may be, unless the child becomes chargeable to the public as a pauper.<sup>1</sup> The statute of Elizabeth applied strictly to blood relatives only;<sup>2</sup> yet a *quasi* parental relation may sometimes be established, so that one may become responsible for the maintenance and education of another, on the principle that the child is held out to the world as part of his family.<sup>3</sup> But a father, as against the public and his own children, cannot well escape the legal duty of providing for the children's support.<sup>4</sup>

249. **Chancery maintenance** is a topic here considered in connection with education. Maintenance as ordered by courts of equity, or allowed by probate courts in settlement of a trust account, has grown into a topic of considerable magnitude, especially under the English system. The rule is, that

<sup>1</sup> 2 Kent, Com. 192; 1 Ld. Raym. 699. But see *Templeton v. Stratton*, 128 Mass. 187 (father of fair capital compelled to support an adult pauper daughter).

<sup>2</sup> § 237; 1 Stra. 190; *Brookfield v. Warren*, 128 Mass. 127 (step-child); *Besondy, Re*, 32 Minn. 385; 118 Ill. 461; 33 Ill. 212.

<sup>3</sup> See *post*, § 273; *ante*, 243 (adoption); *Ela v. Brand*, 63 N. H. 14.

In a state of voluntary separation, the husband *prima facie*, and not the wife, is liable for the support of children living with her; and if the wife be justified in leaving her husband's house and taking the young child with her, she may pledge his credit for the child's necessities as well as her own, so long as he neglects to make reasonable effort to regain the child's custody. *Rumney v. Keyes*, 7 N. H. 571; 11 Wend. 32; 11 Fost. (N. H.) 111; *Gill v. Read*, 5 R. I. 343. And see 15 Gray (Mass.), 78. But circumstances, even where the husband deserts his wife, may repel the idea of an agency thus conferred upon her. As where he deserted before the child was born. *Lapworth v. Leach*, 79 Mich. 16; 121 Ind. 215. The wife carries no such agency with her when divorced. 10 Cush. (Mass.) 41; *Fitler v. Fitler*, 33 Penn. St. 50; 29 Barb. (N. Y.) 124. As to the wife leaving her husband without cause, and taking the minor child with her, cf. 136 Mass. 187; *Baldwin v. Foster*, 138 Mass. 449; *Bazley v. Forder*, L. R. 3 Q. B. 559; 3 Day (Conn.), 37. The mother has her own obligation to support, nourish, and educate according to her means.

<sup>4</sup> *Courtright v. Courtright*, 40 Mich. 633; *Conn v. Conn*, 57 Ind. 323; *Thomas v. Thomas*, 41 Wis. 229; *Welch's Appeal*, 48 Conn. 342; *Buck v. Buck*, 60 Ill. 105; 65 Ohio St. 47. Local statutes affect this question considerably; and the award of alimony is a matter of judicial discretion in divorce suits. See 95 Cal. 374.



where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated as may be fit, out of the income of property absolutely his own, by the person in whose hands the property is held; and equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper.<sup>1</sup>

<sup>1</sup> § 238; *Macphers. Inf.* 218. As a general rule, the father must, if he can, maintain as well as educate his infant children, whatever their circumstances may be; and no allowance will be made him out of their property, while his own means are adequate for such purposes. *Wellesley v. Beaufort*, 2 Russ. 28; 3 Atk. 60; 2 Kent, Com. 191; 3 Atk. 399; *Harland's Case*, 5 Rawle (Penn.), 323; *Myers v. Myers*, 2 McCord, Ch. 255; 11 Bush (Ky.), 120; *Buckley v. Howard*, 35 Tex. 565; *Ela v. Brand*, 63 N. H. 14; 39 N. J. Eq. 227; *Kinsey v. State*, 98 Ind. 351; 96 N. Y. 201; *Bedford v. Bedford*, 136 Ill. 354. See 34 La. Ann. 326 (plantation owned in common). But if the father is unable to maintain or educate his child, suitably to the latter's own fortune and expectations, the court of chancery will order an allowance out of the child's own property. § 238; *Macphers. Inf.* 220; 2 Ashm. (Penn.) 332; 2 Barb. Ch. (N. Y.) 375; *Lagger v. Mutual Loan Co.*, 146 Ill. 283; 136 Ill. 354. The amount of such fortune, as well as the situation, ability, and circumstances of the father, will be taken into account by the court in all such cases. And where a father has himself made no charge for maintaining his infant children, the court will not make it for him in order to benefit his creditors. *Beardsley v. Hotchkiss*, 96 N. Y. 201. Courts now look with great liberality to the state of facts in each particular case of this kind before them. See *e. g.* 3 Ves. 730; 5 Ves. 194; 2 Story, Eq. Jur. § 1354; 1 Cox, 179 (written directions of will considered); 4 Sandf. Ch. (N. Y.) 617; 2 Bradf. Sur. (N. Y.) 349; *Watts v. Steele*, 19 Ala. 652; 64 Ala. 375; 55 Mo. 99; *Sparhawk v. Sparhawk*, 9 Vt. 41; 23 N. J. Eq. 136, 296. As to allowance for past maintenance, cf. 6 E. L. & Eq. 73; *Brown v. Smith*, L. R. 10 Ch. D. 377; 55 Mo. 99; 2 Tenn. Ch. 500; 4 Sandf. Ch. (N. Y.) 619.

A father, even if not in needy circumstances, may maintain or educate his children out of any fund which is duly vested in him for that express purpose. § 238; *Hawkins v. Watts*, 7 Sim. 199; 2 Cox, 223; *Kendall v. Kendall*, 60 N. H. 527. One may also contract in certain cases. 4 Bro. C. C. 224; 4 Sim. 152; *Ransome v. Burgess*, L. R. 3 Eq. 773 (antenuptial settlement); L. R. 12 Eq. 566 (full grown child); 55 Mo. 99. But cf. *Kennison's Trusts*, L. R. 12 Eq. 422 (fund as mere gift). See 3 Ves. 729; *Pearce v. Olney*, 5 R. I. 269 (no implied promise on father's part to repay allowance if able); *Livernois, Re*, 78 Mich. 330 (offset of child's services).

250. The mother, after the death of the father, remains the head of the family; she has the like control over the minor children as he had when living; and she is then bound naturally to support them, if of sufficient ability.<sup>1</sup> In a state of separation or divorce, too, she has her own obligations toward the minor child in her separate custody.<sup>2</sup>

<sup>1</sup> § 239; 16 Mass. 140. But statutes or decisions are sometimes different. Statute of Elizabeth expressly includes the mother.

<sup>2</sup> Nevertheless the courts show special favor to the mother; and if the child has property and means of his own they will rather in any case charge the expenses of his education and maintenance upon such property than force her to contribute. 1 Bro. C. C. 338; 2 Atk. 447; 7 Ves. 403; Macphers. Inf. 224; Pyatt v. Pyatt, 46 N. J. Eq. 285; Roper's Trusts, L. R. 11 Ch. D. 272; Mowbray v. Mowbray, 64 Ill. 383. A widow, on her remarriage, is not liable for the maintenance of a child by a former husband. Besondy, *Re*, 32 Minn. 385. A mother's gift of maintenance to her child may preclude her from claiming recompense. Cottrell's Estate, L. R. 12 Eq. 566. But in any case the widowed mother is entitled to a reasonable allowance out of her children's estate for their maintenance, where her own means are limited, and theirs are ample. 6 Johns. (N. Y.) 566; 4 Desaus. (S. C.) 445; Osborne v. Van Horn, 2 Fla. 360; Bradshaw v. Bradshaw, 1 Russ. 528; 46 N. J. Eq. 285. But the widowed mother who undertakes to support the children from her own means cannot be compelled by her creditor to charge their fund. 133 Ill. 339. Child's valuable services are offset. 76 Ala. 534.

In general, a married woman is not liable for the support and education of her children during the lifetime of a husband and father; and if she renders such support she is entitled, at all events, to an allowance from the estates of the children, or if she dies her estate is not to be charged at the husband's instance. Gladding v. Follett, 95 N. Y. 652; 86 Ga. 363; 4 Madd. 275.

For the effect of divorce, see local statute. A divorce court will sometimes order maintenance on the principle of alimony, where custody of a child is taken from the father. § 239; 3 Gilm. (Ill.) 435; 35 Conn. 538; 144 Ill. 589; 45 Cal. 399; 42 Ark. 495. Where the custody of the minor child has been given to the mother by the court, the father is no longer legally liable to her for the support of the child, apart from some such an order of maintenance. 67 Ind. 583; Brow v. Brightman, 136 Mass. 187. Especially if the mother remarries and her second husband assumes a quasi parental liability. 74 Mich. 437; 121 Ind. 215. And even the misconduct of the father will not always exclude him from the benefits of his child's fortune. Macphers. Inf. 251. See Pierce v. Pierce, 64 Wis. 73.

251. A child's maintenance in chancery is usually restricted to the income of his property.<sup>1</sup> But where the property is small, and the income insufficient for his support, the court will sometimes allow the capital to be broken;<sup>2</sup> though rarely for the purpose of a child's past maintenance when his future education and support will be left thereby unprovided for.<sup>3</sup>

252. Even for his child's necessities, a father is not bound by the contracts or debts of his son or daughter, unless the circumstances show an authority actually given or to be legally inferred; and any agency of the minor child must be closely construed.<sup>4</sup> If, then, the infant child resides at home, it is to be presumed that the father furnishes whatever is necessary and proper for his maintenance; and a proper support being rendered, under such circumstances, a third person cannot supply necessities and charge the father.<sup>5</sup> The converse of this rule has more than once been suggested; namely, that where the father abandons his duty, so that his infant child is forced

<sup>1</sup> § 240; *Macphers. Inf.* 252.

<sup>2</sup> 1 Vern. 255; *Osborne v. Van Horn*, 2 Fla. 360; *Newport v. Cook*, 2 Ashm. (Penn.) 332; *Bostwick, Re*, 4 Johns. Ch. (N. Y.) 100. The terms of the trust may impose special restrictions. *McKnight v. Walsh*, 23 N. J. Eq. 136.

<sup>3</sup> See *Otte v. Becton*, 55 Mo. 99; *Cox v. Storts*, 14 Bush (Ky.), 502. Where the interest is merely contingent the rule is necessarily strict. 11 Ves. 604. And see 14 Ves. 202; *Turner v. Turner*, 4 Sim. 430; 6 Paige (N. Y.), 136. See further, *Guardian and Ward*, *post*, § 337. And the parental right to charge a child's fund as guardian for his education or maintenance in any case is at the most a discretionary right and not to be compelled. *Reynold v. Reynold*, 92 Ky. 556; 133 Ill. 339.

<sup>4</sup> 2 Kent, Com. 192; § 241; 41 Barb. (N. Y.) 558; *Gordon v. Potter*, 17 Vt. 348; 33 N. H. 27; *Tomkins v. Tomkins*, 3 Stockt. (N. J.) 512; *Mortimore v. Wright*, 6 M. & W. 482; *Kelley v. Davis*, 49 N. H. 187.

A child, educated at his father's expense, has no implied authority to hire a tutor for his vacation. *Peacock v. Linton*, 22 R. I. 328.

<sup>5</sup> *Keaton v. Davis*, 18 Geo. 457; *Gotts v. Clark*, 78 Ill. 229; *Rogers v. Turner*, 58 Mo. 116. The parent's contract or failure to supply must be averred and shown by the claimant. 159 Penn. St. 489; *Conboy v. Howe*, 53 Conn. 112. And ratification by allowing the child to wear or consume requires suitable proof. *Id.*

to leave his house, he is liable for a suitable maintenance furnished the child elsewhere.<sup>1</sup>

252 a. In fine, either an express promise, or circumstances from which a promise by the father can be inferred, is essential as a general rule.<sup>2</sup> But very slight evidence may sometimes warrant the inference that a contract for the infant's necessities is sanctioned by the father; so zealous is the court to enforce a moral obligation wherever it can.<sup>3</sup> Yet the rule of principal and agent is to be reasonably enforced; and in all cases where there appears neither palpable moral delinquency on the part of the parent, nor evidence of authority actually conferred upon his son, nor a contract by the parent himself or his other agents, the parent cannot be held liable for the general con-

<sup>1</sup> § 241. But the decisions to this effect are not clear in principle. Cf. 3 Day (Conn.), 37; 45 Ill. App. 447; *Cushman v. Hassler*, 82 Iowa, 295. There can be no doubt that a parent is under a natural obligation to provide necessities for his minor children. But how that obligation is to be enforced is not so clear. 1 Bl. Com. 447. But the doctrine of an implied agency of necessity, upon the minor child's pledge, was applied in *Porter v. Powell*, 79 Iowa, 151 (the minor daughter, sick while living away from home, and supporting herself by permission from her own earnings), and see 92 Iowa, 243. Cf. *Gordon v. Potter*, 17 Vt. 348. English precedent is unfavorable to such a rule. *Mortimore v. Wright*, 6 M. & W. 482; 20 E. L. & Eq. 281; 11 C. B. 452.

<sup>2</sup> *McMillen v. Lee*, 78 Ill. 443; *Freeman v. Robinson*, 38 N. J. L. 383; 3 Stockt. (N. J.) 517; *Schnuckle v. Bierman*, 89 Ill. 454. As to the wife's authority to bind her husband for the child's necessities, see *ante*, 66.

<sup>3</sup> 45 Ark. 237. The American rule is certainly humane and liberal in this respect. Thus, the father is held bound for necessities, where he knows the circumstances, and makes no objection. *Swain v. Tyler*, 26 Vt. 9; *Thayer v. White*, 12 Met. (Mass.) 343; *Fowlkes v. Baker*, 29 Tex. 135; *Clark v. Clark*, 46 Conn. 586. And for the expenses of education and maintenance furnished on his general consent. *Thompson v. Dorsey*, 4 Md. Ch. 149. And see *Courtright v. Courtright*, 40 Mich. 633 (written agreement with divorced wife). Cf. 138 Mass. 449. So, too, being liable once to a third person, the father may be held liable afterwards by implication, unless he clearly revokes. 4 Dutch. (N. J.) 146; *Murphy v. Ottenheimer*, 84 Ill. 39. And see *Deane v. Annis*, 14 Me. 26; *Bailey v. King*, 41 Conn. 365 (waiver of notice). Doubtless any father may contract for supplies, necessary or unnecessary, on his child's account, if he choose to. 4 Conn. 288. And see 14 Me. 26; 38 Ga. 227.

tracts of the child.<sup>1</sup> So where a child has attained full age, the presumption is that he will bind himself by his own contracts.<sup>2</sup>

**253.** The parental duty of providing a trade or profession, as well as a suitable education, must depend upon his condition and circumstances, if, indeed, there be a legal duty at all. Kent observes that this duty is not susceptible of municipal regulation, and is usually left to the dictates of reason and natural affection.<sup>3</sup>

**254.** The decent funeral expenses of his deceased minor child should be borne, in general, by the father.<sup>4</sup>

<sup>1</sup> § 241; 6 C. B. N. S. 262 (acceptance of offer); 2 Bradf. Sur. (N. Y.) 287; 10 Barb. (N. Y.) 483; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Tyler v. Arnold*, 47 Mich. 564. See *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

<sup>2</sup> *Patton v. Hassinger*, 69 Penn. St. 311. And see 3 Pick. (Mass.) 207; 46 Ind. 153; *White v. Mann*, 110 Ind. 74. Whenever a minor son or daughter has left the father's home, the cause should be ascertained; for a child wrongly leaving home cannot pledge one's credit. 10 Barb. 483; 16 Mass. 28; *Weeks v. Merrow*, 40 Me. 151; 94 Me. 465; *Foss v. Hartwell*, 168 Mass. 66. Under the most favorable aspect of the infant's right to bind his father as agent, a third person furnishing goods must take notice, at his peril, of what is necessary for the infant according to his precise situation. 13 Johns. (N. Y.) 480; *Gotts v. Clark*, 78 Ill. 229. Cf. 84 Ill. 39. For effect of Statute of Frauds upon parties' oral personal promise, see *Dexter v. Blanchard*, 11 Allen (Mass.), 365. And see *Freeman v. Robinson*, 38 N. J. L. 383; *Darling v. Noyes*, 32 Iowa, 96; 72 Ga. 140 (outlaw by limitations); *Burns v. Madigan*, 60 N. H. 197; § 241 a.

<sup>3</sup> § 242; 2 Kent, Com. 202. It is within the police power of the legislature to prohibit a parent from putting a young child upon exhibition. *People v. Ewer*, 141 N. Y. 129. See 24 R. I. 421 (bookkeeping).

<sup>4</sup> See *Sullivan v. Horner*, 41 N. J. Eq. 299; 108 Penn. St. 247; *ante*, 210.

In assessing damages recoverable by a minor child for the death of a parent by the wrong of others, courts incline sometimes to consider the reasonable prospective expectation of pecuniary benefit to that child by way of education and support, and physical and moral training, had that parent survived. *Tuteur v. Chicago R.*, 77 Wis. 505; *Railway Co. v. Maddry*, 57 Ark. 306.

## CHAPTER III.

### THE RIGHTS OF PARENTS.

255. The rights of parents result from their duties, being given them by law partly to aid in the fulfilment of their obligations, and partly by way of recompense. As they are bound to maintain and educate, the law has given them certain authority over their children, and in the support of that authority a right to the exercise of such discipline as may be requisite for the discharge of their important trust. This is the true foundation of parental power.<sup>1</sup> These rights are chiefly three: (1) chastisement or correction; (2) custody; and (3) services.<sup>2</sup>

256. (1) As to the right of chastisement or correction, some of the ancient nations gave to the father the power of life and death over his children.<sup>3</sup> The common law, far more discreet, gives the parent only a moderate degree of authority over his child's person, which authority relaxes as the child grows older. It gives the right to moderately correct the child in a reasonable manner; "for," it is said, "this is for the benefit of his education."<sup>4</sup> But at the same time the parent must

<sup>1</sup> 1 Bl. Com. 452; 2 Kent, Com. 208.

<sup>2</sup> § 243.

<sup>3</sup> § 244; Cod. 8, 47, 10; 1 Bl. Com. 452. See *ib.*, as to permitted infanticide. The Roman law finally reduced but did not finally extinguish parental supremacy.

<sup>4</sup> 1 Hawk. P. C. 130; 1 Bl. Com. 452. One *in loco parentis*, as a step-father may become, has the right of moderate correction. *Gorman v. State*, 42 Tex. 221; *Marshall v. Reams*, 32 Fla. 499; *State v. Alford*, 68 N. C. 322. And see, as to the analogous case of a school-teacher, *State v. Burton*, 45 Wis. 150; *Danenhofer v. State*, 69 Ind. 295. See also 89 Ala. 46 (authorized friend of the family); 117 Iowa, 606 (mother's delegation of authority to chastise); 115 Ga. 578.

not exceed the bounds of moderation, nor inflict cruel or merciless punishment.<sup>1</sup>

257. (2) The topic of parental custody is one of absorbing importance in England and America; and its principles have received the most ample discussion in the courts of both countries. The fundamental principle of the common law was that the father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture.<sup>2</sup> The mother, as such, had little or no authority in the premises.<sup>3</sup> But in case there is no father, then the mother is entitled to the custody of the children; supposing, of course, the rights of no testamentary guardian intervene.<sup>4</sup>

258. This common-law doctrine of custody would be unjust were the rules invariable. But the courts of chancery, in as-

<sup>1</sup> § 244. The law reluctantly interferes criminally in such cases unless the parental chastisement produces permanent injury or was maliciously inflicted. *State v. Jones*, 95 N. C. 588; 89 Ala. 46. But cf. *Powell v. State*, 67 Miss. 719. The parent may be indicted for murder or cruelty. 8 Car. & P. 611; 118 Ga. 328; *Fletcher v. People*, 52 Ill. 395; *Johnson v. State*, 2 Humph. (Tenn.) 288; *Hinkle v. State*, 127 Ind. 490. Or for exposure by starvation, etc.; *Regina v. White*, L. R. 1 C. C. 311; 25 R. I. 544. Wilfully permitting a child's life to be endangered for want of proper food or medical treatment, legislation sometimes makes an indictable offence as against a parent or one in his stead. 83 N. Y. 464. But the child's tenderness of age and helplessness are an element in all such cases.

<sup>2</sup> § 245; 3 P. Wms. 151; Forsyth, Custody, 10; 27 Barb. (N. Y.) 9 and cases cited; 1 Dowl. P. C. 34.

<sup>3</sup> See 1 Bl. Com. 453. And so was it with Roman law. Cod. 8, tit. 47, § 4. Indeed, the father is permitted by Anglo-Saxon policy to perpetuate his authority beyond his own life; for he may constitute a testamentary guardian of his infant children. Stat. 12 Car. II. c. 24, re-enacted in most of the United States. See *Guardian and Ward*, c. 1.

<sup>4</sup> She has, as natural guardian, a right to the custody of the person and may educate the fatherless children. 2 Swanst. 536; 2 Kent, Com. 506; 22 Barb. (N. Y.) 178; *Osborn v. Allen*, 2 Dutch. (N. J.) 388. So where the father is sentenced to transportation. 6 Dowl. P. C. 311. The priority of the surviving mother's right to custody is frequently a matter of statute regulation. § 245; 10 Fost. (N. H.) 274; 26 Ala. 87. But her absolute right on remarriage is not so clearly recognized. Her claims, as we shall see hereafter, may conflict with those of a guardian.

suming a liberal jurisdiction over the persons and estates of infants, made the claims of justice override all considerations of parental or rather paternal dominion, at the common law.<sup>1</sup>

259. The English rule was, therefore, that the father is entitled to the sole custody of his infant child; controllable, in general, by the court only in case of very gross misconduct, injurious to the child. Such a state of things was unjust, since it took little account of the mother's claims or feelings

<sup>1</sup> § 246. Thus, Lord Thurlow in *Creuze v. Hunter*, 2 Bro. C. C. 499 n.; 2 Cox, 242; 12 Ves. 492; *Wellesley v. Wellesley*, 2 Bligh, n. s. 124 (on appeal, 1828, a leading case), s. c. 2 Russ. 1 (before Lord Eldon), and see 2 Story, Eq. Juris. § 1341. In this latter case children were taken from a father who was living in adultery. The evidence showed that the conduct of the father was of the most profligate and immoral description, and it appeared that he had ill-treated his wife.

But the result of the English authorities was simply to establish the principle, independently of statutory provisions, that chancery will interfere to disturb the paternal rights only in cases of a father's gross misconduct; such misconduct seeming, however, to be regarded with reference rather to the interests of the child than the moral delinquency of the parent. Forsyth, Custody, 52; *De Manneville v. De Manneville*, 10 Ves. 52; *Warde v. Warde*, 2 Phil. 786. Chancery has nothing to do with the fact of the father's adultery, unless he brings the child into contact with the woman; though unnatural crime is otherwise regarded. *Ball v. Ball*, 2 Sim. 35; Anonymous, 11 E. L. & Eq. 281; s. c. 2 Sim. n. s. 34. Atheism, blasphemy, irreligion, call for interference, when the minds of young children may be thereby poisoned and corrupted; although in matters of purely religious belief there is of course much difficulty in defining that degree of latitude which should be allowed. § 246. Mere poverty or insolvency cannot be alleged to deprive a father of custody; yet the pecuniary interest of the child is considerably regarded. See Forsyth, Custody, 37, 38; Ambl. 307; 2 Bro. C. C. 499; *Creuze v. Hunter*, 2 Cox, 242.

The English courts of common law likewise interfere in questions relating to the custody of infants by writ of *habeas corpus*, which, in general, lies to bring up persons who are in custody, and who are alleged to be subject to illegal restraint. Macphers. Inf. 152; 4 Dowl. P. C. 293; Forsyth, Custody, 17, 54; *Rex v. Greenhill*, 4 Ad. & El. 624. This jurisdiction is less ample than that of the chancery courts, to whose authority it must be considered subservient. See *Wellesley v. Wellesley*, 2 Bligh, n. s. 136, 142; *Ex parte Skinner*, 9 Moore, 278.



in a matter which most deeply interested her.<sup>1</sup> This finally led to the passage of statute 2 & 3 Vict. c. 54 (1839), which introduced important though not radical changes into the law of parental custody.<sup>2</sup> There is a later infants' custody act (36 & 37 Vict. c. 12), under which the surrounding circumstances of a case will be still more sedulously regarded, against a father's own application for custody; and paternal right, the marital duty, and the interest of the child are all considered.<sup>3</sup>

200. In America the doctrine is now universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents and place the care and custody of them elsewhere.<sup>4</sup> The rule as to legal preference is essentially that of the common law, with, however, an increasing liberality in favor of the mother, strengthened, in no slight degree, by positive legislation.<sup>5</sup> Our rule of procedure is somewhat different from that noticeable in the English system. For though sometimes the right of custody is to be determined by *habeas corpus*, and sometimes by proceedings in equity, while very frequently incidental to divorce suits; in any case, the circumstances will be fully considered by the court, and a

<sup>1</sup> The decision in *Rex v. Greenhill*, 4 Ad. & El. 624, which in effect enabled the father to take his children from his blameless wife and place them in the charge of a woman with whom he cohabited, hastened the passage of this act. See § 248; Forsyth, Custody, 69, 137.

<sup>2</sup> 17 Jur. 56; Forsyth, Custody, 137. See this act (known as Justice Talfourd's act) expounded in Woodward, *Ex parte*, 17 E. L. & Eq. 77; 17 Jur. 56. See also *Warde v. Warde*, 2 Phil. 787. Stat. 3 & 4 Vict. c. 90, empowers chancery to assign the care and custody of infants convicted of felony.

<sup>3</sup> Under statute 36 & 37 Vict. c. 12, the custody of a child three years old was given to the mother, her husband having deserted her. *Taylor, Re*, 4 Ch. D. 157. And see *Brown, Re*, 13 Q. B. D. 614; *Elderton, Re*, 25 Ch. D. 220. Grounds upon which a parent's right may be interfered with considered, [1893] 2 Q. B. 232.

<sup>4</sup> 2 Kent, Com. 205, and cases cited; 1 Story, Eq. Juris. § 1841; 45 N. J. Eq. 283.

<sup>5</sup> § 248.

decision rendered on general principles of justice. Nor is the decision so permanent that a change of circumstances might not lead to a change of custody.<sup>1</sup>

261. Custody awarded in divorce proceedings may afford further departure from the common-law rules which favored

<sup>1</sup> § 248; *Green v. Campbell*, 35 W. Va. 698.

The father has, in America, the paramount right of custody independently of all statutes to the contrary. 2 Kent, Com. 205; 3 Hill (N. Y.), 399; *People v. Olmstead*, 27 Barb. (N. Y.) 9; *Miner v. Miner*, 11 Ill. 43; *Cole v. Cole*, 23 Iowa, 433; *Henson v. Walts*, 40 Ind. 170; *Rush v. Vanvacter*, 9 W. Va. 600; *State v. Baird*, 6 C. E. Greene (N. J.), 384; 20 Wash. 652; 13 Ill. 138. He may commit the child to its grandmother. *State v. Barney*, 14 R. I. 62. But this paramount right may be forfeited by his misconduct, nor do the decisions in our courts go to the extent of the English rule in sustaining the husband against his wife, despite his immoral behavior or marital misconduct. *United States v. Green*, 3 Mason (U. S.), 382, per Story, J. The English doctrine of *Rex v. Greenhill* is condemned repeatedly in our courts. The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. *People v. Mercein*, 3 Hill (N. Y.), 399; *Ex parte Schumpert*, 6 Rich. (S. C.) 344; *Wood v. Wood*, 3 Ala. 756; *Gishwiler v. Dodez*, 4 Ohio St. 615; 116 Ga. 114; 91 Fed. (U. S.) 490. Mother thus preferred in a suitable case to the father. See *Moore v. Moore*, 66 Ga. 386. In the case of several children, and parents equally fit, a division of custody agreeably to the several interests of the children may be made. 128 Ill. 378. Our courts have required no statute to prevent them from taking the custody of any child from one whose parental influence, by reason of immoral character or otherwise, is found to be injurious to the child's welfare; if a father wrongs his wife, it is readily presumed that he will wrong his children likewise; and neither parent is secure in a child's custody, if custody with either is palpably against the child's own welfare. 4 Johns. Ch. (N. Y.) 187, 197; 18 Wend. (N. Y.) 637; 41 Ind. 92; *Corrie v. Corrie*, 42 Mich. 509; 16 R. I. 374 (widowed mother remarrying); 95 Cal. 461; *Jones v. Darnall*, 103 Ind. 569 (father as against maternal grandparents); *Briaster v. Compton*, 68 Ala. 299 (adopted child); 37 Ark. 27 (long parental acquiescence in transfer); 15 Neb. 459. The American rule is not, however, one of fixed and determined principles. Much must be left to the peculiar surroundings of each case. § 248; see *Hoxsie v. Potter*, 16 R. I. 374; 32 Fla. 499.

Proceedings as to the custody of children are usually, in this country, conducted by writ of *habeas corpus*, and the court exercises its sound discretion as to merely freeing from restraint or delivering to other custody. § 248 and cases cited.

the paternal right of custody. The same tribunal which hears the divorce cause has power to direct with whom of the parties, or what third person, the children shall be, and direct as to their support.<sup>1</sup> In short, the welfare of the child becomes in modern practice the paramount consideration, nor are parental rights considered without due regard for parental duties.<sup>2</sup>

262. The child's own wishes at years of discretion may sometimes be regarded as to a custodian. The practice is to give the child the right to elect where he will go, if he be of proper age, and the issue is a doubtful one. If he be not of that age, and want of discretion would only expose him to dangers, the court must make an order for placing him in custody of the suitable person;<sup>3</sup> nor will the choice of the child in any case control the court's discretion.<sup>4</sup>

<sup>1</sup> § 249; [1894] P., 295; *Harding v. Harding*, 22 Md. 337; *Goodrich v. Goodrich*, 44 Ala. 670; *Bush v. Bush*, 37 Ind. 164; *Harvey v. Lane*, 66 Me. 536; *Hill v. Hill*, 49 Md. 450; *Carr v. Carr*, 22 Gratt. (Va.) 168 (divorce for wife's desertion); *Taylor, Re*, 4 Ch. D. 157; *D'Alton v. D'Alton*, 4 P. D. 87 (orders changed); 25 Kan. 306. As to parental separation, see 92 Ala. 78; 30 Neb. 624; 84 Minn. 203. The father must at least show his fitness to take custody. *Bryan v. Lyon*, 104 Md. 227; *Murphy, Ex parte*, 75 Ala. 409; *Smith v. Bragg*, 68 Ga. 650. But as against a stranger in blood, see 90 Ind. 150. Even though a divorce be obtained for the wife's bigamous adultery, the court's discretion in custody is not concluded in the husband's favor. 152 Mass. 16; 12 Col. 421.

Temporary arrangements are sometimes ordered. *Hutson v. Townsend*, 6 Rich. Eq. 249; *Barnes v. Barnes*, L. R. 1 P. & D. 463; *Welch, Re*, 74 N. Y. 299. As to modifying the order of custody after divorce, see *Harvey v. Lane*, 66 Me. 536.

<sup>2</sup> Where a divorce court has jurisdiction of the parties, a common-law court disinclines to entertain a question of custody upon *habeas corpus*. 117 Mo. 249.

Local legislation should be carefully considered, whereby new rules are made. See 42 Kan. 216 (wives and husbands put upon a joint or equal footing of consideration); 35 Barb. (N. Y.) 307; 64 N. J. Eq. 21; § 249.

<sup>3</sup> Sixteen or fourteen years of age is found a court or statutory limit for regarding the child's election. § 250; *Mallinson v. Mallinson*, L. R. 1 P. & D. 221. See, as to children too young, *Rust v. Vanvacter*, 9 W. Va. 600; *Henson v. Walts*, 40 Ind. 170.

<sup>4</sup> *Marshall v. Reams*, 32 Fla. 499; *People v. Watts*, 122 N. Y. 238.

263. Concerning contracts which transfer the parental rights, there is some discrepancy in the decisions.<sup>1</sup>

264. (3) Parental right to the child's labor and services is recognized. This right, like that of custody, rests upon the parental duty of maintenance, and furnishes some compensation to the father for his own services rendered the child.<sup>2</sup>

<sup>1</sup> See 16 E. L. & Eq. 221; 14 Law Reporter, 269; and see *Goodenough, Re*, 19 Wis. 274; *Bently v. Terry*, 59 Ga. 555.

Such contracts are not to be inferred from doubtful circumstances, nor will temporary permission be construed as an absolute and permanent one. See *Scarritt, Re*, 76 Mo. 565; 34 Ind. 168; *Weir v. Marley*, 99 Mo. 484; 152 Mass. 432; 22 Ark. 92; 30 N. H. 274 (parol insufficient). But a fair contract of transfer, on a good and executed consideration, ought not to be set aside and custody restored unless the parent can show that a change will promote the child's welfare. *Cunningham v. Barnes*, 37 W. Va. 476; 50 W. Va. 244; 117 Ga. 993. And see, as to adoption, *ante*, 243. American courts hold fast, nevertheless, to the true interests and welfare of the child. § 251. And hence the contract of a parent unfit to have custody of the child, which surrenders that child by formal instrument, fair in its terms, to a benevolent institution, for the purpose of having the child brought up in a good family, or to some other suitable third party, has been so far upheld, where the institution or person intrusted has not failed in duty, that the child is suffered to remain where he was placed, for the reason that his welfare requires it, rather than be returned to the parent who seeks to recover custody once more. *State v. Barrett*, 45 N. H. 15; *Dumain v. Gwynne*, 10 Allen (Mass.), 270; 9 Phila. 571; *Bonnett v. Bonnett*, 61 Iowa, 198; 47 Iowa, 435; *Bullen, Ex parte*, 28 Kan. 781. See *Sword v. Keith*, 31 Mich. 248 (long lapse of time); 32 Ohio St. 299. If a father, after making an assignment of the services or society of his minor child, has retaken the child into his own keeping, the assignee's only remedy on his own behalf (if any he have) is by action on the contract. *Farnsworth v. Richardson*, 35 Me. 267. An adjudication of the appropriate tribunal on the question of the custody of an infant child, brought up on *habeas corpus*, may be pleaded as *res adjudicata*. *Mercein v. People*, 25 Wend. (N. Y.) 64.

A parent, if personally suitable, is not debarred from recovering custody of a young child who, without parental consent, has been bound out in some emergency by the public authorities. *Goodchild v. Foster*, 51 Mich. 599; *Farnham v. Pierce*, 141 Mass. 203. See *Briaster v. Compton*, 68 Ala. 299. And the right of the child's custodian under some parental contract is always strongest and most positive as against third parties. 27 Fla. 238. As to custody in matters of guardianship, see *infra*, Part IV.

<sup>2</sup> § 252; 1 Bl. Com. 453; 2 Kent, Com. 193. Whether this right remains absolute in the father until the child has attained full age is ap-

The right of action to recover for the services of a minor is accordingly presumed to be in his father;<sup>1</sup> and all agreements for the minor's hire should be made under the father's sanction and supervision.<sup>2</sup>

**265.** But when the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, and especially wherever he has been remiss in his own parental duties, our courts are reluctant to admit his right to the child's services.<sup>3</sup> Of the emancipation of children, thus or otherwise secured, we shall speak hereafter.<sup>4</sup> The parent may voluntarily relinquish the right to his child's earnings, and may permit the child to earn for himself, receive

parently a matter of doubt. All will admit that the father's right continues until the child reaches fourteen. And since the father's guardianship by nature extends through the full term of the child's minority; since, too, he may by will place a testamentary guardian of his own choice over the infant; since it is reasonable that the law should set off years of later usefulness against years of earlier helplessness; in short, since the age of majority is fixed as the period when an infant becomes legally emancipated from his father's control, — we may fairly assume that, all other things being equal, the father is actually entitled to the value of his child's labor and services until the latter becomes of age. § 252; 1 Bl. Com. 453; 7 Mass. 145; 2 Mass. 113; 4 Mason (U. S.), 380; 1 N. H. 28; *Nightingale v. Withington*, 15 Mass. 272; cf. 2 Kent, Com. 193.

<sup>1</sup> 12 Ill. 397; 5 Wend. (N. Y.) 204; *Hollingsworth v. Swedenborg*, 49 Ind. 378; *Monaghan v. School District*, 38 Wis. 100. See 34 N. H. 49; 5 Dutch. (N. J.) 117; 19 Ala. 604; *Hill & Den.* (N. Y.) 36; 13 Barb. (N. Y.) 286 (*quantum meruit*). We assume that the child lives at home or is supported by the parent. And if a child, being of full age, chooses to remain with the father, or is imbecile and needs to be harbored at home, the relation may continue so as to entitle the parent, either as such or on the principle of master and servant, to recover for the child's wages in the same manner. 5 Dutch. (N. J.) 117; *infra*, c. 5.

<sup>2</sup> *Sherlock v. Kimmel*, 75 Mo. 77; *State v. Anderson*, 104 N. C. 771; *Hunt v. Adams*, 81 Me. 356 (child kept at work on Sunday, illegally).

<sup>3</sup> § 252 *a*; *Jenness v. Emerson*, 15 N. H. 489.

<sup>4</sup> See *infra*, §§ 267, 268. An infant daughter's marriage terminates her father's right to her services. *Ib.*; 126 N. C. 462. An infant son who marries must use his earnings to support his wife. *Commonwealth v. Graham*, 157 Mass. 73. And see 79 Hun (N. Y.), 580 (commitment for crime).

his earnings, and appropriate them at pleasure.<sup>1</sup> Such an agreement may be in express terms, or it may be implied from circumstances.<sup>2</sup>

**266.** Whatever private arrangement may exist between the father and his son, unless brought to the employer's notice, cannot be set up to justify payment to the minor himself.<sup>3</sup> Nor can one who employs the minor son of another be held liable to the father as for breach of contract, because of such minor's delinquencies;<sup>4</sup> but he should duly keep in mind the parental right of notice where the child proves remiss.<sup>5</sup>

**266 a.** A mother has no implied right to the services and earnings of her minor child at the common law; not being bound

<sup>1</sup> Even if the father is insolvent, he may thus relinquish, provided this be done in good faith. *Wilson v. McMillan*, 62 Ga. 16; *Atwood v. Holcomb*, 39 Conn. 270; *Wambold v. Vick*, 50 Wis. 456; 17 Neb. 335. But cf. 17 Ala. 14. And see *Campbell v. Cooper*, 34 N. H. 49; *Atkins v. Sherbino*, 58 Vt. 248.

A father may by wrongdoing forfeit the right of custody and services of his children and yet be bound to support them. 83 Mo. App. 335.

<sup>2</sup> § 252 a. An American court favorably regards contracts of this nature, for the child's benefit, as they are in conformity with the spirit of free institutions. 3 Dutch. (N. J.) 143; 11 Humph. (Tenn.) 104; *Ben-ziger v. Miller*, 50 Ala. 206. See *post*, c. 5. See further, 47 Barb. (N. Y.) 589 (local statute); 15 N. H. 486 (pauper parent); *Smith v. Smith*, 30 Conn. 111 (parental laches); *Cahill v. Patterson*, 30 Vt. 592 (incomplete contract for buying minor's time).

<sup>3</sup> *Kauffelt v. Moderwell*, 21 Penn. St. 222; *Mason v. Hutchins*, 32 Vt. 780. Cf. 25 Vt. 478; 3 Barb. (N. Y.) 115.

<sup>4</sup> *Hennessy v. Stewart*, 31 Vt. 486. But cf. *Schoenberg v. Voight*, 36 Mich. 310 (son's embezzlement); *Tennessee Man. Co. v. James*, 91 Tenn. 154.

<sup>5</sup> *Day v. Oglesby*, 53 Ga. 646. Cf. *Sherlock v. Kimmel*, 75 Mo. 77. Illegal employment of child without parent's knowledge does not debar the latter's recovery of wages. *Emery v. Kempton*, 2 Gray, 257. And see 138 Mass. 249; 132 Mass. 304; 35 So. 885 (assent to one employment is not assent to another).

For the rule concerning wages due a seaman, see 3 Ware (U. S.), 45, 82; 23 Pick. 492; *White v. Henry*, 24 Me. 531. As to enlistments in the army or navy, the laws contemplate that the contract is personal and for the benefit of the infant. *Bishop v. Shepherd*, 23 Pick. 492; 1 Mason (U. S.), 84; *Baker v. Baker*, 41 Vt. 55; 14 Allen (Mass.), 497; *Mears v. Bickford*, 55 Me. 528; *Cadwell v. Sherman*, 145 Ill. 348; 65 Ill. 255. But cf. *Ginn v. Ginn*, 38 Ind. 526.

as a father would be for the child's maintenance. Nor have her rights or liabilities in these respects been usually regarded as equivalent to those of a father, even where she is the only surviving parent.<sup>1</sup> But the modern tendency is certainly to treat a mother's rights with considerable favor, especially if she be a widow rendering the child support.<sup>2</sup>

267. The parent is usually deemed owner of the clothing furnished by him to his minor child; and so with various other articles given the child by way of parol gift from the parent.<sup>3</sup> A parent, too, has an insurable interest in the child's life.<sup>4</sup>

268. But as a rule, over the child's general property, the parent has no rights. And herein the common law strongly distinguishes the child from the wife. The law treats legacies, gifts, distributive shares, and the like, which may vest in a person during minority, as his own property; and the modern practice is to require the appointment of a guardian in such cases, to manage the estate until the child comes of age.<sup>5</sup>

<sup>1</sup> 1 Bl. Com. 453; 3 N. H. 29; *People v. Mercen*, 3 Hill (N. Y.), 400; *Pray v. Gorham*, 31 Me. 240; *McMahon v. Sankey*, 133 Ill. 636; *Snediker v. Everingham*, 3 Dutch. (N. J.) 143. See 10 Met. (Mass.) 439; 3 Stockt. (N. J.) 268.

<sup>2</sup> § 254; *McElmurray v. Turner*, 86 Ga. 215; 158 Mass. 402; 77 S. W. 1021. Cf. *Matthewson v. Perry*, 37 Conn. 435; *Hammond v. Corbett*, 50 N. H. 501; 49 Ind. 378; 21 Hun (N. Y.), 364.

<sup>3</sup> § 253; 4 Cush. (Mass.) 114; 21 Ill. 620; 49 Barb. (N. Y.) 21; *Burke v. Louisville R.*, 7 Heisk. (Tenn.) 451 (mother).

Money given to the minor child by the parent for no specific purpose is more naturally deemed the child's property. See 268, *post*; 4 Cush. (Mass.) 114. But money intrusted to the minor for a specific purpose and by the latter misapplied, may be recovered from the receiver by the parent; at all events if the parent repudiates promptly and makes such restitution of the thing purchased as lies in his power. *Sequin v. Peterson*, 45 Vt. 255 (foolish outlay by child); 14 N. H. 367 (payment secretly to compound a crime); *Condon v. Hughes*, 92 Mich. 367.

<sup>4</sup> § 253; *Mitchell v. Union Ins. Co.*, 45 Me. 104. But cf. *Worthington v. Curtis*, 1 Ch. D. 419.

<sup>5</sup> § 255; 21 Vt. 539; 7 Cow. (N. Y.) 36; *Cowell v. Daggett*, 97 Mass. 434; 3 Monr. (Ky.) 30. And see *Selden's Appeal*, 31 Conn. 548; *Richardson's Case*, L. R. 19 Eq. 588 (fraud upon others). An administrator or trustee who pays the child's money to the father as parent incurs a personal risk. *Perry v. Carmichael*, 95 Ill. 519; *Clark v. Smith*,

269. By appropriate statute the rights of parents in relation to the custody and services of their children may be enlarged, restrained, and limited, as wisdom or policy may dictate, unless the legislative power is limited by some constitutional prohibition.<sup>1</sup>

13 S. C. 585. A father, as such, cannot be judicially empowered to sell his son's land. *Guyenn v. McCauley*, 32 Ark. 97. Nor can he encumber it for any debt. 14 Bush (Ky.), 502. And see 59 Ga. 509 (conveying an easement). The parent's investment of his child's money for the child's benefit will be protected against all of his own creditors, who are chargeable with notice of the child's rights. *McLaurie v. Partlow*, 53 Ill. 340. See *Southwestern R. v. Chapman*, 46 Ga. 557 (income payments for child's necessities). While the parent may be called the natural guardian of the child, this is not such a guardianship as gives the right to control or manage the child's property; for here a chancery or probate appointment should be made; but equity would hold the parent to account like any intermeddler or holder of trust funds. See *Bedford v. Bedford*, 136 Ill. 354; 67 N. Y. S. 143; *Guardian & Ward*, Part IV. *post*.

<sup>1</sup> § 256; 1 Mason (U. S.), 71; *Bennet v. Bennet*, 2 Beas. (N. J.) 114; *State v. Clottu*, 33 Ind. 409. The State has no constitutional right to interfere with the parent and take charge of a child's education and custody, on any mere allegation. *People v. Turner*, 55 Ill. 280. See as to "Sunday laws," *McCrary v. Lowell*, 44 Vt. 116. On the other hand, a statute not penal in character, by which the State, as *parens patriæ*, assumes the care and custody of neglected children so as to supply to them the parental custody they have lost, is pronounced constitutional. *Farnham v. Pierce*, 141 Mass. 203; *Whalen v. Olmstead*, 61 Conn. 263; 18 Ore. 339; 161 Mass. 70. See 152 Mass. 432 (parental custody restored). Considerations of the parental religion do not bind judicial discretion for such a child's welfare. *Whalen v. Olmstead*, 61 Conn. 263; 18 Ore. 339.

A minor child has an insurable interest in his parents' life, and of a policy thus taken out for his benefit he cannot be arbitrarily deprived. *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; *Martin v. Aetna Ins. Co.*, 73 Me. 25 (an adopted child).



## CHAPTER IV.

### THE PARENT'S RIGHTS AND LIABILITIES FOR THE CHILD'S INJURIES AND FRAUDS.

270. Two distinct topics receive treatment under the head of the parent's rights and liabilities for the child's injuries and frauds: (1) The parent's right of action where his child is the injured party. (2) The parent's liability to action where his child is the injuring party.<sup>1</sup>

271. (1) Where a child suffers wrong, he has his own action for the personal injury.<sup>2</sup> But besides this, the parent may usually claim indemnity for loss of his minor child's services, to which should be added the incidental expenses incurred in consequence of the injury. Hence arises a cause of action in the parent *per quod*, the foundation of which is a loss of the child's services. There are various tortious acts, by which a parent may be deprived of his child's services; and the law is generous in securing compensation for the injury; though the theory here seems rather that of master often than of strict parent.<sup>3</sup>

<sup>1</sup> § 257.

<sup>2</sup> See *post*, Part V. c. 4.

<sup>3</sup> § 258; *Wilton v. Middlesex R.*, 125 Mass. 180 (though child should meantime have reached majority); *Grinnell v. Wells*, 7 M. & Gr. 1041; *Rogers v. Smith*, 17 Ind. 323; 21 Wend. (N. Y.) 615; *Natchez R. v. Cook*, 63 Miss. 38 (widowed mother); 24 R. I. 447. Some late cases prefer to say that the right is based upon the parental relation, as distinct from, though analogous to, that of master and servant. 59 Fed. (U. S.) 417.

A parent may recover the expense of nursing and healing his minor child of such tender years that it is incapable of rendering him any service, from one who wilfully or negligently injures such child. *Sykes v. Lawlor*, 49 Cal. 236; *Connell v. Putnam*, 58 N. H. 534; 57 Tex. 123; 75 Mo. 54. Cf. 44 Cal. 46; *Sawyer v. Sauer*, 10 Kan. 519; 2 Cush. (Mass.) 347. The English rule and our earlier one was more strict.

272. Statutes enlarging the rights of widows, dependent parents, and others, in torts occasioned by the negligence of railroad corporations and certain other companies, are to be found in England and America. Under such statutes it is frequently provided that, where a child is thus killed, the child's administrator may sue for the parent's benefit.<sup>1</sup> For though natural equity may assert otherwise, the common law does not permit a father to recover for injuries causing the immediate death of his child, either on the ground of loss of services or for burial expenses.<sup>2</sup>

7 Dowl. & Ry. 138; 4 B. & C. 660; 8 Scott N. R. 741; 21 Wend. (N. Y.) 615; 2 Cush. (Mass.) 347. But here, as in other suits for damage, indirect and unreasonable items of damage should be excluded. *Barnes v. Keene*, 132 N. Y. 13. The loss of the child's prospective society, solace, and comfort, is not a basis in such suits, but the pecuniary value of service during minority or as a servant. *Railroad Co. v. Watly*, 69 Miss. 145; 24 R. I. 447; 127 Ind. 545; 121 Mo. 227. If the child be a burden, instead of a support, in earning capacity, this should be considered. 98 Ala. 285.

<sup>1</sup> § 259; 4 H. & N. 653; 20 La. Ann. 25; 54 Penn. St. 495; 69 Ind. 458; 95 Ill. 519; 103 Ind. 328. Cf. local statutes.

<sup>2</sup> *Osborn v. Gillett*, L. R. 8 Ex. 88; *Edgar v. Castello*, 14 S. C. 20; *McDowell v. Georgia R.*, 60 Ga. 320; 1 Cush. (Mass.) 475. Parental suit not allowed against the seller of a weapon to a young boy, in violation of law, with which the boy carelessly killed himself. *Poland v. Earhart*, 70 Iowa, 285. But suit allowed against one who employed a child, without the father's consent, in dangerous service, and negligently caused the child's death. *Fort Wayne R. v. Beyerle*, 110 Ind. 100. As to circumstances of such employment and knowledge that the child was a minor, cf. 67 Tex. 190; 61 Tex. 262. And see 58 Vt. 40.

In suits for damages caused by corporate negligence, our juries, and sometimes the courts and legislature, incline to extravagant computation of a punitive sort. See rule of statute held constitutional in 84 Ga. 345. Burial expenses, if the child dies of the injury, are recoverable. 121 Mo. 227. Prospective services of the child during minority, less the cost of support, should be considered in case the child is killed, and actual pecuniary damage estimated, 95 Cal. 510. Whether the statutory action by administrator and the parental action coexist, see 53 Ark. 117. As to suit by one in *loco parentis* or where child was of age, see *Pennsylvania R. v. Keller*, 67 Penn. St. 300; *Mercer v. Jackson*, 54 Ill. 397; *Whitaker v. Warren*, 60 N. H. 20.

Trespass lies *per quod* for loss of services occasioned by assault and battery of the child. *Hammer v. Pierce*, 5 Harring. (Del.) 171; 7 Watts

273. Every person who designedly interrupts the relation subsisting between parent and child, by procuring the child to depart from the parent's service, or by harboring and keeping him after he has quitted his home, commits a wrongful act, for which he is responsible to the parent. The offence, where force was not used, is known as enticement, and the same rule applies to the relation of master and servant.<sup>1</sup> Abduction or kid-

(Penn.), 62; Ware (U. S.), 75 (on high seas); Cowden v. Wright, 24 Wend. (N. Y.) 429.

Relinquishment of services is for determination on the usual principles. Arnold v. Norton, 25 Conn. 92; Texas R. v. Crowder, 61 Tex. 262. And see 8 Watts (Penn.), 227 (reversion). And the parent's negligence or laches, may, in certain cases, defeat his own right of action for loss of service altogether, as well as that of the young child for the injury suffered. *Infra*, Part V. c. 4; Pierce v. Millay, 62 Ill. 133; Smith v. Hestonville R., 92 Penn. St. 450; 66 Ohio St. 559; 57 Penn. St. 172. The death of the child after the injury, though it may terminate the right to sue for the child's tort, does not affect the parent's consequential right of action. Natchez R. v. Cook, 63 Miss. 88. And see Ware (U. S.), 80; Ihl v. Street R., 47 N. Y. 317. As to compromising or releasing damages, see 116 Ga. 147.

<sup>1</sup> § 260. In such cases, again, the parent sues on a principle analogous to that of the master; namely, because of an alleged loss of service; or possibly in trespass *vi et armis* upon the more reasonable allegation of loss of the child's society. Lumley v. Gye, 2 El. & B. 224; 2 Brev. (S. C.) 276; Sargent v. Mathewson, 38 N. H. 54; 3 Bl. Com. 140. And this action will lie on behalf of the mother after the father's death. Moore v. Christian, 56 Miss. 408. The *quo animo* of the defendant in such suits is always material. 2 H. Bl. 511 (mere employment insufficient); 6 Cush. (Mass.) 249; Sargent v. Mathewson, 38 N. H. 54; 1 Iowa, 356. Indictment lies for the offence of abduction or enticement. 55 Ala. 114; 76 N. C. 194; L. R. 2 C. C. 154; 59 Cal. 386 (enticing for immoral purposes); 46 N. J. L. 432. But criminal process does not lie where the child went voluntarily and spontaneously. 100 N. Y. 590; 15 Lea (Tenn.), 674; 56 Mich. 544.

As to enticement generally, see *post*, Part VI. c. 4; Noice v. Brown, 39 N. J. L. 569; Morgan v. Smith, 77 N. C. 37; Schnucke v. Bierman, 89 Ill. 454 (as to boarding a runaway child); Huntoon v. Hazelton, 20 N. H. 388. The father may sue on the basis of a contract for his absconding child's wages; but he is put to his election. Thompson v. Howard, 31 Mich. 309; Grand Rapids R. v. Showers, 71 Ind. 451; Lawyer v. Fritcher, 130 N. Y. 239 (enticement with fraudulent inducement).

napping is an offence similar to enticement, but implying the use of force rather than persuasion; and the parental remedies are similar.<sup>1</sup>

274. Even in seduction suits the same technical principle is rather absurdly, though not always unkindly, applied. The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest times, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which he is supposed to have a legal right or interest.<sup>2</sup> At common law the seduced woman herself has no cause of action against her seducer.<sup>3</sup> And without some allegation and proof of loss of service in a parent or master the action is not maintainable.<sup>4</sup>

<sup>1</sup> § 260. As in abducting a child for a sailor. *Ware* (U. S.), 91; 4 *Mason* (U. S.), 380; *Cutting v. Seabury, Sprague* (U. S.), 522; 12 *Cush.* (Mass.) 215. See 2 *Met.* (Mass.) 89; 14 *Pick.* (Mass.) 510. Or for a soldier. Whether force or persuasion was used in the abduction of a child does not affect the parental right of action. *Lawrence v. Spence*, 99 N. Y. 669; *Caughey v. Smith*, 47 N. Y. 244.

There must be a reasonable limit to suits by the parent for loss of his child's services or society. Hence the parent cannot sue one for enticing his child into a marriage against the parent's consent. 4 *Litt.* (Ky.) 25; *Hervey v. Moseley*, 7 *Gray* (Mass.), 479; 2 *Greene* (Iowa), 329. It is not "kidnapping" to carry away a girl of suitable age and then marry her with her consent. *Cochran v. State*, 91 *Ga.* 763. For a forcible abduction, resulting in an imperfect marriage, and aggravated cases of a like nature, where, in fact, there is not a valid union, there might be a remedy. But for drawing children of suitable age into a marriage which pleases themselves, the law affords no redress; nor can it punish for the sake of parental discipline. And even though the match be unhappy, yet marriage must supersede the filial relation. § 261. See *Lawyer v. Fritcher*, 130 N. Y. 239. As to excluding a child from school, see 23 *Pick.* (Mass.) 224; 38 *Me.* 376; 15 *Ind.* 73; 14 *Barb.* (N. Y.) 222; 21 *Ohio St.* 666. And see generally 4 *B. & C.* 660; 7 *M. & Gr.* 1033; *Eager v. Grimwood*, 1 *Exch.* 61; 129 *Penn. St.* 138 (separated parents).

<sup>2</sup> § 261; *Grinnell v. Wells*, 7 *M. & Gr.* 1033; *Eager v. Grimwood*, 1 *Exch.* 61; 7 *Ired.* (N. C.) 408; *Sutton v. Huffmann*, 32 *N. J. L.* 58; *Knight v. Wilcox*, 14 *N. Y.* 413.

<sup>3</sup> *Woodward v. Anderson*, 9 *Bush* (Ky.), 624. But local statutes change or modify the rule at this day.

<sup>4</sup> 90 *Tenn.* 673; 73 *Mich.* 588; 7 *M. & Gr.* 1033; *Harris v. Butler*, 2

275. That the daughter should be under age is not essential in order that the parent may maintain the action for seduction. The important question is, whether emancipation in fact had taken place at the time of the injury; for if the relation of master and servant exists between the father and his grown-up daughter, however this relation may have been created, the right of action is complete.<sup>1</sup> So where one stands

M. & W. 539. But the evidence of the relationship of service may be very slight; and the right of action once clear, damages far in excess of the loss of service are usually recoverable, practically regarding the wrong done by her disgrace to the young woman's household and to her own character and prospects. § 261; 2 C. & P. 303; 5 H. & N. 16; 10 Mo. 634; 2 Kent, Com. 205.

The question is whether there was, at the time the injury was committed, a *bona fide* relation of constructive service between parent and child, which suffered by the wrongful act of the defendant. 7 C. B. N. s. 96; 5 H. & N. 16; Hedges v. Tagg, L. R. 7 Ex. 283; 6 M. & W. 55; Kinney v. Laughenour, 89 N. C. 365; Davies v. Williams, 10 Q. B. 725; Ogborn v. Francis, 44 N. J. L. 441; 15 C. B. 344; 28 E. L. & Eq. 371; Evans v. Walton, L. R. 2 C. P. 615. This rule of constructive service is, however, carried very far, by many of our later and humane decisions. Sutton v. Huffman, 32 N. J. L. 58; 28 Md. 370; Ellington v. Ellington, 47 Miss. 329; 4 Me. 33; Simpson v. Grayson, 54 Ark. 404; Terry v. Hutchinson, L. R. 3 Q. B. 599 (an extreme case); Evans v. Walton, L. R. 2 C. P. 615. And it is probably at no point short of her abode in another household where the parent has relinquished the right of her service past the power of recall, that the bounds should be placed to this rule of a daughter's service entitling the parent to sue for damages. In other words, the father may sue *per quod* where he does not relinquish the daughter's services, but retains the right to command them, though she resides elsewhere. Mohry v. Hoffman, 86 Penn. St. 358; Blagge v. Ilsley, 127 Mass. 191. Cf. 71 Ill. 252. Very slight service at home every Sunday, where the daughter is employed by another, suffices. Kennedy v. Shea, 110 Mass. 147; Riddle v. McGinnis, 22 W. Va. 253.

Enticing one's daughter away for the purpose of prostitution or concubinage or seduction, is made an indictable offence in some States. 90 Ill. 274; 27 Conn. 319; 48 Ga. 192; 55 N. Y. 644; 29 Ohio St. 542; Galvin v. Crouch, 65 Ind. 56. And see general writers on Criminal Law and Torts. See State v. Jones, 16 Kan. 608 (woman's chaste repute). Illicit intercourse alone does not constitute what is known as seduction. People v. Clark, 33 Mich. 112.

<sup>1</sup> § 261; 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 370; 6 Iowa, 97; Wert v. Strouse, 38 N. J. L. 184; Hahn v. Cooper, 84 Wis.

*in loco parentis*, he may recover damages, as an actual parent would.<sup>1</sup>

276. As to the amount of damages in parental suits for injury, cases of seduction stand on a peculiar footing.<sup>2</sup> The ground of action is the loss of services; yet far more is allowed.<sup>3</sup> In suits such as for enticement or abduction the measure of damages applied is liberal, though the rule is somewhat conflicting in different States.<sup>4</sup>

629 (imbecile daughter at home); 7 B. & C. 387 (separated married woman). And see 13 N. Y. Supr. 575 (grandfather).

<sup>1</sup> 11 East, 28; 2 T. R. 4; 3 Comst. (N. Y.) 312; 5 Sneed (Tenn.), 146; 21 Ill. 161. But cf. 9 Barb. (N. Y.) 533.

As to surviving mother, see 10 Mo. 634; 50 Barb. (N. Y.) 100. Statutes sometimes extend the mother's action. See *Gray v. Durland*, 51 N. Y. 424; 3 Thomp. & C. (N. Y.) 293; 4 Ill. App. 282; *Furman v. Van Sise*, 56 N. Y. 435. Cf. *Blanchard v. Ilsley*, 120 Mass. 487.

The wrongful act for which the parent sues must be the natural and direct cause of the injury for which damages are sought, and the damages recoverable its necessary and proximate consequence. § 361 *a*; *Knight v. Wilcox*, 14 N. Y. 413. But mental illness is sufficient, notwithstanding seduction was followed neither by pregnancy nor sexual disease. 2 C. & P. 303; *Abrahams v. Kidney*, 104 Mass. 222. See as to fraudulent marriage, etc., *Lawyer v. Fritcher*, 130 N. Y. 239; 18 N. Y. 46; 2 Stark. 435. Daughter's consent does not bar parental suit. 90 Tenn. 673; 5 Lansing (N. Y.), 454. The latest legislation in some States tends to place seduction suits on a more natural footing, by enabling the woman to sue an offender directly in damages for her own seduction and the consequent injury. 51 Ind. 599; 49 Mich. 540; 50 Mich. 602; 85 Ind. 399. Previous chastity need not be averred. 102 Ind. 494. Nor special damage. 88 Ind. 298. A female of nonage may thus sue. 121 Ind. 292.

<sup>2</sup> § 362.

<sup>3</sup> 11 East, 28; 8 C. P. 9; *Robinson v. Burton*, 5 Harring. (Del.) 335; 26 Wis. 372; 7 Bush (Ky.), 133; *Dain v. Wyckoff*, 18 N. Y. 45; *White v. Murtland*, 71 Ill. 250. See further, on this subject, 13 Gratt. (Va.) 573; 1 Head (Tenn.), 134; 1 Exch. 61; 11 Ind. 466; 31 Minn. 54; 10 Mo. 634. Exemplary damages have been denied where the daughter's willing misconduct appeared. 82 Mo. 341. And where before confinement the daughter marries another man, the father's damages may prove merely nominal. 70 Iowa, 223: and see 78 Mich. 588 (statute).

<sup>4</sup> § 363; *Lumley v. Gye*, 2 El. & Bl. 216; *Magee v. Holland*, 3 Dutch. (N. J.) 86. Prospective value, etc., in negligent killing, besides medical expenses, costs, etc., are allowed. 26 N. Y. 49; 7 Watts (Penn.) 62; 3 H. & N. 211. For the loss of service for the remainder of the period of minority, a

277. (2) Where the child is the injuring party, the question arises, how far a father is responsible in damages. We have seen that the husband's responsibility for his wife's injuries at the common law is founded upon his right, by marriage, to her property. Very different is the relation of parent and child, where, it is now plain, the father has little more than the right to claim his child's wages, so far as the infant's property is concerned.<sup>1</sup> Yet some have been misled into the belief that the two cases are entirely analogous; and they would hold the father liable for his son's wrongful acts, as a husband for the wife's.<sup>2</sup> For injuries occasioned by the infant with his father's direct sanction, order, or participation, or while in the due course of employment by the father, the latter is held answerable to others.<sup>3</sup> But on the

parent may usually recover if such loss necessarily result; while if the injury continue beyond that period further right is usually in the child. 4 Abb. App. 422; *McDowell v. Georgia R.*, 60 Ga. 320; *Houston R. v. Miller*, 49 Tex. 322; *Hussey v. Ryan*, 64 Md. 426. And see 4 H. & N. 653; 3 H. & N. 211; 24 R. I. 447; 60 Md. 340; *Wilt v. Vickers*, 8 Watts (Penn.), 227; *Penn. R. R. Co. v. Kelly*, 31 Penn. St. 372; *Sawyer v. Sauer*, 10 Kan. 519. But see, as to battery of a child, *Klingman v. Holmes*, 54 Mo. 304. See also *Rooney v. Milwaukee Chair Co.*, 65 Wis. 397. Local statutes may control. 12 Met. (Mass.) 291; 25 Me. 39. Parent's contributory negligence debars from damages. 204 Penn. St. 543, 623.

<sup>1</sup> *Ante*, 268.

<sup>2</sup> § 263. See *Strohl v. Levan*, 39 Penn. St. 177; 1 Duvall (Ky.), 316. But cf. 24 Mo. 219; *Paul v. Hummel*, 43 Mo. 119; *Tift v. Tift*, 4 Denio (N. Y.), 175. The responsible occupation of premises on which vicious animals are kept is sometimes a legal element. But the father is not liable in damages where his son set another's property on fire. *Edwards v. Crume*, 13 Kan. 348. And see 33 Kan. 580. See also *Paulin v. Howser*, 63 Ill. 312; *Chandler v. Deaton*, 37 Tex. 406; 45 Kan. 423. The want of parental knowledge or sanction here appeared. For the peculiar rule of the Louisiana code, see 35 La. Ann. 13, 891; 37 La. Ann. 92.

<sup>3</sup> *Teagarden v. McLaughlin*, 86 Ind. 476 (careless clearing of land); *Hoverson v. Noker*, 60 Wis. 511 (careless shooting). (Evidence that the father knew his children had thus misconducted before.) Cf. *Hagerty v. Powers*, 66 Cal. 368. And see *Hower v. Ulrich*, 156 Penn. St. 410 (enjoying benefit of wrong); 23 Ky. Law Rep. 461. For all such injuries (subject to the usual scope of negligent performance as another's agent or servant) an infant is answerable at law to others out of his own estate; at least, if he is old enough to have known better. But the

whole it may be stated as a rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child.<sup>1</sup>

parent's liability is the present issue. As to the Roman and the modern civil law, see § 263; 111 La. Ann. 143 (minor child convicted).

<sup>1</sup> § 263. And see *Moon v. Towers*, 8 C. B. N. S. 611; 83 Ill. App. 481. As to the injuries of a servant, and his master's liability, see *Master and Servant*, *infra*, §§ 488-491. As to the infant's own liability, see *post*, Part V. c. 4.



## CHAPTER V.

### DUTIES AND RIGHTS OF CHILDREN, WITH REFERENCE TO THEIR PARENTS.

278. The general duties of children to their parents are founded more on principles of natural justice than on positive precept.<sup>1</sup> The obligation, as a legal one, is somewhat vague and indefinite, extending little farther than the succor of parents in distress. Gratitude, certainly, is what all parents true to their trust have the right to expect; but whether it is due to those who were negligent and unfaithful to their offspring may admit of much doubt. In other words, honor and reverence are to be justly awarded according to one's deserts.<sup>2</sup> Thus may be explained the well-settled rule, that there is no legal obligation resting upon a child to support a

<sup>1</sup> § 204. "For to those who gave us existence," says Blackstone, "we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance." 1 Bl. Com. 453. And see 2 Kent, Com. 207.

<sup>2</sup> § 204; 1 Stra. 190; 16 Johns. (N. Y.) 281; *Lebanon v. Griffin*, 45 N. H. 558; *Stone v. Stone*, 32 Conn. 142; *Becker v. Gibson*, 70 Ind. 239. The child, when full grown, naturally marries and assumes parental liabilities of his own; and in the usual course of things adults, whether father or son, will prudently provide for their future as well as their present wants. Some have thought it the duty of fathers to leave property to their children at their death, — a principle somewhat at conflict with this right to lean upon their children for their own maintenance. Yet exceptional cases must occur where a father, faithful to his own obligations, is yet left, through misfortune, penniless in his old age; and so too with a mother, yet more; and here the voice of nature bids the children aid, comfort, and relieve, while municipal law quickens them.

parent; that, while the parent (or at least a father) is bound to supply necessities to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessities to his aged parent. But statutes enforce an obligation to that extent.<sup>1</sup>

279. The rights of children with reference to their parents may be considered more at length.<sup>2</sup> To contracts for necessities and other transactions by the child the principles of agency are applied.<sup>3</sup>

280. A father may emancipate his young child and thus give him a right to his own earnings. The term "emancipation" is borrowed from the Roman law, and may be referred to the old formality of enfranchisement by the father.<sup>4</sup> The Amer-

<sup>1</sup> § 265. See *ante*, 248 (Stat. 43 Eliz. etc.). Local statute expression will determine the extent of legal relief required. 2 Kent, Com. 208; 16 Johns. (N. Y.) 281; 12 Iowa, 512.

The promise of a child to pay for past expenditures in relief of an indigent parent is not binding in law. *Mills v. Wyman*, 3 Pick. (Mass.) 207; 7 Conn. 57. Cf. Civil Code of Louisiana, art. 245. But for necessities or other goods furnished to the parent, or for the parent's benefit, at a grown child's request, the latter is chargeable, as any one else would be. *Lebanon v. Griffin*, 45 N. H. 558; *Gordon v. Dix*, 106 Mass. 305; *Becker v. Gibson*, 70 Ind. 239. Where, furthermore, one of several children renders support at the request of the others, they will be liable on an implied promise to contribute. *Stone v. Stone*, 32 Conn. 142. And see 18 La. Ann. 594; 50 Barb. (N. Y.) 329; *Hough v. Comstock*, 97 Mich. 11.

<sup>2</sup> General transactions require proof of actual authority; and a son has ordinarily no more right, as such, to lend his father's goods than a stranger. *Johnson v. Stone*, 40 N. H. 197; *Greenfield Bank v. Crafts*, 2 Allen (Mass.), 269. Cf. 3 Minn. 28; *Sequin v. Peterson*, 45 Vt. 255; 87 Mo. App. 404.

<sup>3</sup> § 266; *ante*, 252. A child cannot recover on the ground of relationship upon a promise made for his benefit to his parent, if the consideration came wholly from the parent. *Marston v. Bigelow*, 150 Mass. 45.

<sup>4</sup> Bouvier, Law Dict. "Emancipation": Inst. 1, 12; § 267. In Louisiana, the emancipation of minors is expressly recognized and regulated by law, and decrees of emancipation are judicially made. *Allison v. Watson*, 36 La. Ann. 616. At the English law, the term "emancipation" is generally used with reference to matters of parochial settlement and the support of paupers. See 7 Q. B. 574, *n.*; 1 B. & C. 347 (minor's enlistment). But in American cases it often has a significance more

ican doctrine, as frequently stated, is that a father may "emancipate" his child for the whole remaining period of minority, or for a shorter term; that this emancipation may be by an instrument in writing, by verbal agreement or license, or by implication from his conduct; and that emancipation is valid against creditors, and to some extent against the father.<sup>1</sup>

281. Emancipation in such a sense may be either by instrument in writing or by parol agreement, or it may be inferred from the conduct of the parent.<sup>2</sup> Emancipation, strictly so called, is not to be presumed; it must be proved. It is a

nearly approaching that of the civil law; though we are apt to use the word without much regard to precision. § 267.

We find in the English books little said as to the emancipation of minor children by their fathers. While the principle is discussed, the doctrine has been maintained that during the minority of the child he will remain, under almost any circumstances, unemancipated; that in fact there can be no emancipation of an infant unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as to wholly and permanently exclude the parental control. 6 T. R. 247; 5 B. & Ad. 525. But emancipation is not so strictly construed in this country.

<sup>1</sup> *Abbott v. Converse*, 4 Allen (Mass.), 530; 2 Kent, Com. 194, n.; 3 Pick. (Mass.) 201; 7 Cow. (N. Y.) 92; 11 Vt. 258; *Rush v. Vought*, 55 Penn. St. 437. This doctrine of emancipation is peculiarly favored where both the child and parent invoke it in order to protect the minor's earnings against the unfortunate parent's creditors. § 267; 97 Me. 473.

<sup>2</sup> § 267 a. As to instruments in writing, usually known as indentures, see local statutes; and so as to those bound out as apprentices generally. Such statutes are pretty strictly construed. 138 Mass. 249. Minor child of pauper parents not emancipated so as to gain a settlement by the indenture of the selectmen. 48 Me. 565. An indenture inoperative against the child by reason of informality may yet afford proof that the parent meant to relinquish the child's earnings. *Kerwin v. Wright*, 59 Ind. 369. The usual policy is to require the child's own consent to the instrument. Emancipation by parol agreement or license of the parent should be acted upon. *Abbott v. Converse*, 4 Allen (Mass.), 530. Yet there can be little doubt at the present day that a father can verbally sell or give his minor son his time; and that after payment or performance the son is entitled to his earnings. 5 Wend. (N. Y.) 204; *Snediker v. Everingham*, 3 Dutch. (N. J.) 143; 1 N. H. 28; 2 Watts (Penn.), 406; 19 Pick. (Mass.) 29; § 267 a. Parol agreements are, however, within the statute of frauds. 5 Wend. (N. Y.) 204.

question of fact to be implied from the circumstances and from the conduct of the parties interested.<sup>1</sup> But there is such a thing as partial and incomplete emancipation of a child, even though the latter be allowed by the parent to work and control his own earnings.<sup>2</sup>

<sup>1</sup> Circumstances may be sufficient to entitle the child to his or her own wages for the time being, which cannot constitute emancipation as against the father. 3 Me. 223; 2 Wend. (N. Y.) 459; *Monaghan v. School District*, 38 Wis. 100; *Dierker v. Hess*, 54 Mo. 246; *Donegan v. Davis*, 66 Ala. 362; 72 Me. 509; *Beaver v. Bare*, 104 Penn. St. 58. We are to distinguish, in fact, between a license for the child to go out and work temporarily, and the more positive renunciation of parental rights. *Arnold v. Norton*, 25 Conn. 92. But other circumstances may raise a special contract on the minor's behalf, or indeed be held to emancipate him altogether; and our courts are very liberal in allowing children to avail themselves of any breach of parental obligation (as in absconding or leaving young child to shift for himself) so as to earn an honest livelihood by their own toil. 26 Me. 167; 11 Humph. (Tenn.) 104; 15 Mass. 275; 7 W. & S. (Penn.) 362; 1 Iowa, 356; 4 Desaus. (S. C.) 185; 2 Blackf. (Ind.) 440; *Lyon v. Bolling*, 14 Ala. 753; *Ream v. Watkins*, 27 Mo. 516; 97 Me. 473. And see *Wodell v. Coggeshall*, 2 Met. (Mass.) 89; 3 Houst. (Del.) 633. The presumption raised in such cases may be termed a presumption of necessity. Even slighter circumstances, which impute no misconduct to the father, but evince a consent for his son to leave the parental roof and go into the world to seek his own fortune, or so that his own insolvency shall not involve his child's chances of self-support, are often construed into emancipation. 8 Stockt. (N. J.) 268; 4 E. D. Smith (N. Y.), 231; *Dodge v. Favor*, 15 Gray (Mass.), 82; 39 Me. 406; *Clemens v. Brillhart*, 17 Neb. 335; 133 Mass. 249; 39 Conn. 270. And there may be complete emancipation, although the minor continues to reside with his father. *M'Closky v. Cyphert*, 27 Penn. St. 220; 54 Mo. 246; 66 Ala. 362.

<sup>2</sup> § 267 a; 79 Iowa, 151; 91 Tenn. 154. The child's own desertion from home does not constitute emancipation. *Bangor v. Readfield*, 32 Me. 66.

Remarriage of a widowed mother, whose new husband does not assume paternal functions towards the child, favors the idea of emancipation. *Hollingsworth v. Swedenborg*, 49 Ind. 378. But see 21 Hun (N. Y.), 364; 25 R. I. 544; 70 Me. 484 (pauper settlement).

As to the infant's own marriage it is the later and truer theory, that if such marriage be a legal and valid one, though contracted in defiance of the parent's wishes, parental rights and control must yield to the new and superior status which the child has thereby assumed, so far as appropriating earnings is concerned. *Bucksport v. Rockland*, 56 Me. 22; *Aldrich v. Bennett*, 63 N. H. 415; *Commonwealth v. Graham*, 157 Mass. 73; *Sherburne v. Hartland*, 37 Vt. 528. Cf. 24 Me. 531; 18 Tex. 367.

282. **As to the effect of emancipation:** the consequence is, on the one hand, to give the child the right to his own wages, the disposal of his own time, and, in a great measure, the control of his own person; on the other hand, to relieve the parent of all legal obligation to support.<sup>1</sup> Moreover, such child's earnings in arrears go to his administrator upon his decease, to be distributed according to law.<sup>2</sup> Property purchased by the emancipated minor with his own means, too, is undoubtedly his own, and not subject to the parent's control or disposal.<sup>3</sup> A father may give to his son a part instead of the whole period of his minority, in which case the rights of the latter are limited accordingly, and the parental control and duties are still upheld.<sup>4</sup> In brief, the minor who is released from his father's service stands, as to his contracts for labor either with strangers or with him, upon the same footing as

A minor's marriage with the parent's due consent has doubtless this effect. § 267.

<sup>1</sup> 15 Mass. 272; 19 Pick. (Mass.) 29; *Hollingsworth v. Swedenborg*, 49 Ind. 378; 11 Vt. 258; 4 E. D. Smith (N. Y.), 231; § 268.

<sup>2</sup> 11 N. H. 191; *Bell v. Bumpus*, 63 Mich. 375.

<sup>3</sup> 6 Mont. 243; *ante*, 268.

<sup>4</sup> *Tillotson v. McCrillis*, 11 Vt. 477. And see 79 Iowa, 151; *Winn v. Sprague*, 35 Vt. 243; 91 Tenn. 154. The father cannot sue for the services of such son performed within the period embraced by their agreement. 6 Conn. 547; 2 Met. (Mass.) 89; *Bray v. Wheeler*, 29 Vt. 514. And see 12 Mass. 375. Still less can the father's creditors attach such earnings, or property purchased therewith for the infant's benefit. 2 Vt. 290; *McCloskey v. Cyphert*, 27 Penn. St. 220; 21 Ark. 387; 23 Me. 569; 12 Rich. (Mass.) 113; 14 Ala. 753; *Johnson v. Silsbee*, 49 N. H. 543; *Dierker v. Hess*, 54 Mo. 246; 98 Mo. 247; 21 Hun (N. Y.), 364. But the child sues in such case for his own wages. 27 Mo. 516. As to an infant's suits, see *post*, Part V. c. 6. And see *Benziger v. Miller*, 50 Ala. 206. Recovery by the son in a suit will bar an action by the father. *Scott v. White*, 71 Ill. 287. As to notice of emancipation, see 1 Allen (Mass.), 405.

The father cannot retract his consent that the child shall have his own wages, after the wages are earned. *Torrens v. Campbell*, 74 Penn. St. 470. Emancipation should be *bona fide*. 89 Ala. 619. Cf. 148 Mass. 550. But an insolvent father's emancipation of his child is not unfavorably regarded. 37 W. Va. 242. Even though the child should then work for his mother. *Id.* Emancipation may occur in effect upon the divorce of parents. *Grimm v. Taylor*, 96 Mich. 5.

if he had arrived at full age; and such being the case, the father may himself contract to employ and pay the child for his services, and be bound in consequence like any stranger to fulfil his agreement.<sup>1</sup>

**283.** A child, on arriving at full age, becomes legally emancipated. But whether son or daughter, the child, by continuing with the parent and living at the same home, may still be legally in the service of the parent.<sup>2</sup> If a child, then, after arriving at the age of twenty-one years, continues to live, labor, and render service in the father's family, with his own knowledge and consent, but without any agreement or understanding as to compensation, the presumption favored is, that the parties do not contemplate a payment of wages for services, on the one hand, nor a claim for board and lodging on the other. For where the relation of parent and child exists, the law will not readily assume that of debtor and creditor likewise; and board and services may constitute a fair mutual offset in the general household.<sup>3</sup> But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract to that effect.<sup>4</sup> That

<sup>1</sup> § 268; 12 Penn. St. 64; *Hall v. Hall*, 44 N. H. 293; *Wright v. Dean*, 79 Ind. 407; 181 N. Y. 300.

<sup>2</sup> § 268; 2 Kent, Com. 206; *Hardwick v. Paulet*, 36 Vt. 320. On this point there is no dispute; but in settling the presumptions of law there is apparently some conflict of authorities, according to the nature of the suit. See *ante*, 274, as to seduction suits; *Hawkins v. Hyde*, 55 Vt. 55; *Zimmerman v. Zimmerman*, 129 Penn. St. 229; *Switzer v. Ker*, 146 Ill. 577. Such contracts are strictly personal. *Campbell v. Potter*, 147 Ill. 576.

<sup>3</sup> § 269; *Lipe v. Eisenlerd*, 32 N. Y. 229 (child's suit for recompense not favored); 30 Penn. St. 473; 2 Duv. (Ky.) 312; *Heywood v. Brooks*, 47 N. H. 231; *Wilson v. Wilson*, 52 Iowa, 44; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Guffin v. First Nat. Bank*, 74 Ill. 259; *Pellage v. Pellage*, 32 Wis. 136; 92 Ky. 556.

As to whether a father is liable for necessities (*e. g.*, medical treatment) furnished to his adult child at her request while she is a member of his family, see *Blachley v. Laba*, 63 Iowa, 22. At common law a father is not liable for necessities furnished an adult child, unless at least a suitable agency to bind him be shown. *Ib.*; *Crane v. Baudoine*, 55 N. Y. 256; *ante*, 252 *a*.

<sup>4</sup> 16 Ill. 296; 41 Mo. 441; 3 Vroom (N. J.), 105; *Freeman v.*

valid contracts of this kind between parent and adult child can be made is unquestionable.<sup>1</sup>

284. Gifts between members of the same family are not greatly to be favored; and as to the father's alleged gift to his child, the presumption is in favor of the father's continued possession as head of the family. Yet where there is sufficient proof of a gift from parent to child, fully executed by delivery, it will be upheld as irrevocable.<sup>2</sup> On the other hand, while

Freeman, 65 Ill. 106; 16 N. Y. Supr. 68; Hilbish v. Hilbish, 71 Ind. 27; Steel v. Steel, 12 Penn. St. 66; Kurtz v. Hibner, 55 Ill. 514; Young v. Herman, 97 N. C. 280; Reando v. Misplay, 90 Mo. 251 (parent insane); 47 Penn. St. 534. See as to *quantum meruit*, Byrnes v. Clark, 57 Wis. 13; Friermuth v. Friermuth, 46 Cal. 42.

<sup>1</sup> Ulrich v. Ulrich, 136 N. Y. 120.

For circumstances considered in such cases, see Harris v. Currier, 44 Vt. 488; 6 Ind. 60; Adams v. Adams, 23 Ind. 50; 5 Wis. 472; Second Nat. Bank v. Merrill, 81 Wis. 142 (working in father's business); Pratt v. Pratt, 42 Mich. 174; Brown v. Knapp, 79 N. Y. 136 (support of parents); 16 Ill. 106. And see Hays v. Seward, 24 Ind. 352; 2 Mass. 415; Davis v. Goodenow, 27 Vt. 717; Seavey v. Seavey, 37 N. H. 125; 96 N. C. 149.

As to stepchildren, grandchildren, and others standing in a *quasi* filial relation, similar considerations will apply. *Post*, § 273. In all cases of this kind some distinct understanding is always desirable. § 270. Upon the marriage of a daughter, all obligation of her parents for support ceases; yet there is no presumption of liability for her support if she continues in the parental abode. 3 Col. App. 338.

<sup>2</sup> § 270; Kellogg v. Adams, 51 Wis. 138. Beneficial deed of real estate, taken by the father in the name of his child, presumed to be a gift to the child. Francis v. Wilkinson, 147 Ill. 370. Even though the father keeps possession of the deed. 141 Ill. 400; 91 Tenn. 147. And if the deed reserves express rights to the parents, and is recorded, this presumption becomes the stronger. Compton v. White, 86 Mich. 33. But with no apparent intent to deliver and no record, the case may be otherwise. 92 Tenn. 573. See also Yeakel v. McAtee, 156 Penn. St. 600; Harrison v. Harrison, 36 W. Va. 556. A note given by the father to the child may be shown to be a gift. 92 Ky. 556. And see Carney v. Carney, 196 Penn. St. 34; 110 Ga. 440.

If by parol the gift should be direct, positive, and clear. The parent's promise to give cannot be enforced on the child's behalf, against him or his estate, on a mere consideration of love and affection. As to settlements in equity on wife or child, see *ante*, Part II. c. 14. If a valuable consideration be interposed, the settlement is supported more firmly; and specific

an adult child may make a binding transfer or conveyance of property to the parent, any such transfer by way of gift or improvident contract, made just after attaining majority, or while in general under undue parental control and influence, will be jealously regarded by courts of equity.<sup>1</sup> All family arrangements of the filial kind, whether child or parent be the weaker party, should, in order to stand firmly, be free from fraud or undue influence on either side, and made in good faith; or equity will readily set them aside.<sup>2</sup> To support, however, a general contract or transaction between a parent and his adult child, as against strangers, a slight consideration is often held sufficient.<sup>3</sup>

performance of an executory promise to transfer may be in some instances decreed. 71 Mo. 610; *Haitt v. Williams*, 72 Mo. 214; *Kurtz v. Hibner*, 55 Ill. 514. As to raising an equity by reason of a meritorious, but not valuable consideration, for enforcing an incomplete gift, see 50 N. J. Eq. 500.

<sup>1</sup> § 270. See *Guardian and Ward*, *post*, Part IV. c. 9.

<sup>2</sup> 8 R. I. 170; 28 Mich. 321; *Rider v. Kelso*, 53 Iowa, 367; *Miller v. Simonds*, 72 Mo. 669; *Jacox v. Jacox*, 40 Mich. 473; *Mackall v. Mackall*, 135 U. S. 167. Cf. 147 Ill. 370.

<sup>3</sup> 7 Har. & J. (Md.) 257; 9 Gill, 32; 122 Fed. (U. S.) 223; *Jackson v. Peek*, 4 Wend. (N. Y.) 300 (bond). The want of a valuable consideration may be a badge of fraud upon creditors; but if so, it is only presumptive, not conclusive, evidence of it, and may be met and rebutted by opposing evidence. 11 Wheat. (U. S.) 213; 6 Md. 435; *Kain v. Larkin*, 131 N. Y. 300; *Lord v. Locke*, 62 N. H. 566. A father may serve gratuitously as trustee or guardian for his child, and his creditors cannot compel him to charge for their benefit. 88 Ky. 242. This is the American rule; though, as we have seen, the statutes with reference to voluntary settlements do not receive a uniform interpretation in our State courts. *Ante*, 196. And see *Carter v. Grimshaw*, 49 N. H. 100; *Wilson v. Kohlheim*, 46 Miss. 346; *Kaye v. Crawford*, 22 Wis. 320; *Monell v. Scherrick*, 54 Ill. 269; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Guffin v. First Nat. Bank*, 74 Ill. 259. See further, 66 Ill. 421 (house built by son on father's land); 55 Ill. 514; 44 Mich. 413; 85 Va. 252 (listing for taxation); *Brown v. Scott*, 7 Vt. 57 (providing home for indigent father). As to investment of child's earnings, etc., see 3 Stockt. (N. J.) 268; 17 Ala. 14; 62 Ga. 16. As to minor's improvement of land, see 4 S. & R. (Penn.) 207.

The English cases as to transactions, strictly between parent and child, turn chiefly upon trusts and family settlements. There are recent cases where the transactions of children with fortunes have been set aside in equity, for undue influence exerted injuriously over them by their parents.



285. If the father makes an advancement to a child, towards the latter's distributive share in his estate, the rule is to reckon this after the father's death in making the distribution.<sup>1</sup> The

35 E. L. & Eq. 100, 449. So with a gift from child to parent. 39 E. L. & Eq. 147; *Turner v. Collins*, L. R. 7 Ch. 329. Equity shows disfavor to pecuniary transfers made just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child. *Archer v. Hudson*, 7 Beav. 551. See *Houghton v. Houghton*, 11 E. L. & Eq. 134; s. c. 15 Beav. 278. On the other hand, as between members of the same family, if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between mere strangers, but such as on the most comprehensive experience have been found to be for the interest of families. *Ib.* § 271 (ejectment against an imbecile father); *Tanham v. Nicholson*, L. R. 5 H. L. 561. Mortgage by emancipated children over age, to secure a debt of their father, upheld in favor of the mortgagee, but not in favor of the father. *Bainbridge v. Brown*, 50 L. J. Ch. 522.

<sup>1</sup> § 272; *Schouler, Executors*, §§ 499, 500; 2 P. Wms. 435. And so is it with one standing *in loco parentis*. Thus annuities have been reckoned an advancement; contingent provisions; large premiums for a trade or profession; and loans of considerable importance to a son. 3 Gif. 263; 2 P. Wms. 435; *Boyd v. Boyd*, L. R. 4 Eq. 305. But small and inconsiderable sums for current expenses, ornaments, and the education of children are not so reckoned. 2 Wms. Ex'rs, 6th Am. ed. 1498-1505. And see 29 Beav. 422; *Stock v. McAvoy*, L. R. 15 Eq. 55. See as to a loan made on the son's promissory note towards a business which turned out badly. The father on his death-bed caused the promissory note to be burned, and died intestate. It was held that although the circumstances under which the note had been destroyed amounted to an equitable release of the debt; yet that the sum which remained due on it must be considered an advancement to the son. *Gilbert v. Wetherell*, 2 Sim. & Sta. 254. But cf. 31 Beav. 583; *Bennett v. Bennett*, L. R. 10 Ch. D. 474. The rule in America does not appear to be very strict; and in some States the statutes of distributions, unlike those of England, permit nothing to be reckoned as an advancement to a child by the father, unless proved to have been so intended and chargeable on the child's share by certain evidence prescribed. 17 Mass. 356; *Harley v. Harley*, 57 Md. 340; change of parental intention not favored. 23 Penn. St. 85; *Sherwood v. Smith*, 23 Conn. 516; 1 Stockt. (N. J.) 572; *Storey's Appeal*, 83 Penn. St. 89; *Thurber v. Sprague*, 17 R. I. 634. The suggestion that an unequal distribution among children results, will

sale of expectant estates by heirs is not to be encouraged.<sup>1</sup> But the present rule of chancery is to support such sales to others, if made *bona fide*, and for valuable consideration; and in case of an heir apparent, if the instrument be made with the knowledge and consent of the father.<sup>2</sup> The child's right of inheritance from his parent, it may be added, is strongly favored both in England and America. But while in the former country the eldest son is preferred as to real estate, the American rule is that all children shall inherit alike, whether sons or daughters. And a father's will is to be construed with favor to his own offspring.<sup>3</sup>

not avail. *Ib.*; 132 Ill. 385. And see 147 Ill. 370. But cf. *Culp v. Wilson*, 133 Ind. 294. Cf. 7 Bush (Ky.), 259. Advancements do not bear interest, unless, at all events, the intention to that effect be very clear. 17 Mass. 356; *Nelson v. Wyman*, 21 Mo. 347; *Porter's Appeal*, 94 Penn. St. 232.

A transaction between parent and child may constitute a loan rather than either gift or advancement. 16 N. Y. Supr. 280; 29 Beav. 422; 67 Miss. 413. See further as to proof, etc., § 272; *Rains v. Hays*, 6 Lea (Tenn.), 308 (conveyance of land); *Kershaw v. Kershaw*, 102 Ill. 307; *Roberts v. Coleman*, 37 W. Va. 143; 59 S. C. N. S. 467.

Where the child of a father dying intestate has received an advancement, in real or personal estate, and wishes to come into the general partition or distribution of the estate, he may bring his advancement into *hotchpot* with the whole estate of the intestate, real and personal; and shall thereupon be entitled to his just proportion of the estate. 2 Kent, Com. 421; *Jackson v. Jackson*, 28 Miss. 674; *Barnes v. Hazleton*, 50 Ill. 429; *Schouler, Executors*, §§ 499, 500. In such case the value of the property at the time of advancement governs in the distribution. See 4 Jones, Eq. (N. C.) 207; *Beebe v. Estabrook*, 18 N. Y. Supr. 523. The principle of this rule is equality of distribution. A debt from parent to child must of course be separately accounted for out of his estate. 40 Ch. D. 543.

<sup>1</sup> § 272; 1 Bro. C. C. 10; Co. Litt. 265 a; *Sugden, Vendors*, 314, and cases cited; 1 Story, Eq. Juris. §§ 336-339; *Trull v. Eastman*, 3 Met. (Mass.) 121; 1 Hoff. Ch. (N. Y.) 383.

<sup>2</sup> *Curtis v. Curtis*, 40 Me. 24. See *Walker v. Walker*, 67 Penn. St. 186 (private agreement of children to release all rights of inheritance to one, if that one would maintain the father for life).

<sup>3</sup> See 2 Kent, Com. 421; 4 Kent, Com. 471; *Schouler, Executors*, §§ 499, 500.

As to interest on a child's legacy allowable from the death of the

286. As to the quasi parental relation, it is well settled that in the absence of statutes a person is not entitled to the custody and earnings of stepchildren, nor bound by law to maintain them.<sup>1</sup> Yet, if a stepfather voluntarily assumes the care and support of a stepchild, he stands *in loco parentis* for the time being; and the presumption then is, that they deal with each other as parent and child, and not as contracting parties; and consequently neither compensation for board is presumed on the one hand, nor for services on the other.<sup>2</sup> So may this *quasi* relation exist between the child and some other person, — such as a grandfather, — and with similar legal consequences reciprocally.<sup>3</sup>

deceased parent and testator, see § 273; 106 Mass. 586; 22 N. J. Eq. 44; Brown v. Knapp, 79 N. Y. 136.

<sup>1</sup> § 273; 4 T. R. 118; 2 Kent, Com. 192; 4 Mass. 675; 57 Ill. 489; McMahon v. McMahon, 113 Ill. 461; Besondy, Re, 32 Minn. 385; 17 Ore. 115 (guardian of stepchild); Ackerman, Re, 116 N. Y. 654. The child's right to the beneficial use of his own property, inclusive of a farm on which his stepfather lives with his mother, is regarded on a mutual accounting in such cases. Springfield v. Bethel, 90 Ky. 593; 129 Ill. 509. And see 74 Wis. 176 (adult stepdaughter); 78 Conn. 607; 69 Ark. 285; 55 N. Y. S. 1060.

<sup>2</sup> 4 East, 77; 8 Comst. (N. Y.) 312; 7 Cal. 511; 79 Minn. 360; 25 R. I. 318; 14 Penn. St. 201; 27 Vt. 715; 18 Ill. 46; 52 Mo. 357; 24 Kan. 140; 64 Ill. 383; Livingston v. Hammond (1894), Mass.; 149 Ill. 195. Homestead rights are thus acquired by a stepfather. 86 Ga. 576. For claims upon the estate of a deceased stepson, see Gayle v. Hayes, 79 Va. 542.

<sup>3</sup> 5 Jones (N. C.), 217; 50 Penn. St. 456; 86 Tex. 296; Hays v. McConnell, 42 Ind. 285; 77 Md. 494; 44 Iowa, 98. As between son-in-law and father-in-law, see Wright v. Donnell, 34 Tex. 291; Schoch v. Garrett, 69 Penn. St. 144; Rogers v. Millard, 44 Iowa, 466. All this, however, is matter of evidence upon the facts. Coe v. Wager, 42 Mich. 49; 39 N. J. Eq. 227; Norton v. Ailor, 11 Lea (Tenn.), 563; Ela v. Brand, 63 N. H. 14. And such relation may extend, as with natural parents, beyond the child's minority under suitable circumstances. Bixler v. Sellman, 77 Md. 494; 137 Ill. 349, 403; 56 Ark. 382; 43 Wis. 160; 79 Mich. 54; Broderick v. Broderick, 28 W. Va. 378; Dodson v. McAdams, 96 N. C. 149. See *ante*, 283. As to third parties, the usual test is whether one has held out the child as a member of his own family. St. Ferdinand Academy v. Bobb, 52 Mo. 357; 60 N. H. 20; 72 N. H. 241.

For an adopted child the doctrine *in loco parentis* is applied as to

287. Claims for services rendered to a parent, or to some one standing in place of a parent, are not unfrequently presented against the parental estate after decease.<sup>1</sup>

288. Whether a son or daughter may sue the parent or quasi parent for alleged breach of duty during minority is sometimes asked; such child having reached majority. The courts should discourage such litigation; and so upon corresponding grounds the parent's suit as to any cause of action referable to the period and relation of tender childhood.<sup>2</sup> With reference to a

services and wages. *Brown v. Welsh*, 27 N. J. Eq. 429. See *ante*, 248. In the case of distant relatives and strangers, any presumption that one goes to live in the household on the footing of member of the family instead of servant is less strong than where one is a child; and such presumption is more readily overcome by circumstantial evidence. 66 Barb. (N. Y.) 507; *Tyler v. Burrington*, 39 Wis. 376; *Neal v. Gilmore*, 79 Penn. St. 421. And see 40 Iowa, 38; 37 Mich. 68. As to strangers, indeed, when the child is old enough to perform valuable service beyond the worth of support, the presumption is rather that of a contract relation for compensation. 59 Ind. 485.

<sup>1</sup> § 274; *Schouler, Executors*, § 432; *Freeman v. Freeman*, 65 Ill. 106; 17 N. Y. Supr. 16; *Hiatt v. Williams*, 72 Mo. 214. Thus, where an adult child resides with and performs valuable service for the parent, an understanding may be shown between them of recompense either in money or by way of testamentary provision under the parent's will. Mere expectation cannot create an enforceable contract; but a mutual understanding, if shown, may afford the basis of a valid claim against an estate. See 17 N. Y. Supr. 311, 322, and cases cited; 87 Ga. 678; 90 Mo. 251. Presumptions, however, as we have seen, are unfavorable to such claims and must be overcome. 129 Penn. St. 229; 118 Mo. 418; 90 Ga. 581; *Ellis v. Cary*, 74 Wis. 176. So, too, presumptions are against the reimbursement of parental care and trouble bestowed upon one's offspring. *Seitz's Appeal*, 87 Penn. St. 159. Where the relationship was more distant, or the parties concerned were not kindred at all or united by marital ties, the inference of a promise to recompense the service rendered is of course more readily raised, whether the claim be presented against the person served, or against his estate, upon his decease. *Briggs v. Briggs*, 46 Vt. 571; *Morton v. Rainey*, 82 Ill. 215; *Broderick v. Broderick*, 28 W. Va. 378. And see 59 Ind. 485; 74 N. C. 552.

<sup>2</sup> Clear precedents are wanting on these points; but the policy of the common law appears to be hostile to permitting such suits. And see *Hewlett v. Ragsdale*, 68 Miss. 703; § 275.

Equity regards the rights of parent and child, as well as of husband and wife, and separates their property interests. *Post*, Part V. c. 6. An

blood parent, surely, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household.<sup>1</sup>

oppressive contract relative to property extorted by a parent from the child, or by an adult child from the parent, may doubtless be relieved against. *Bowe v. Bowe*, 42 Mich. 195.

<sup>1</sup> § 275; *Schrimpf v. Settegast*, 36 Tex. 296 (*quasi relations*); 125 Ind. 168. In strong cases, a child's right of redress lies during minority and at the time of the offence.

## CHAPTER VI.

### ILLEGITIMATE CHILDREN.

**289.** Illegitimate children, or bastards, stand upon a different footing from legitimate children. The rights and disabilities of bastards, as such, and while continuing illegitimate, require our present attention.<sup>1</sup>

**290.** The rights of a bastard are very few at the common law; children born out of a legal marriage having been from our earliest times stigmatized with shame, and made to suffer through life the reproach which was rightfully visited upon those who brought them into being.<sup>2</sup>

**291.** The most important disability of an illegitimate child at the common law is that he has no inheritable blood; that he is incapable of becoming heir, either to his putative father or to his mother, or to any one else; that he can have no heirs but those of his own body.<sup>3</sup> But in America there are various

<sup>1</sup> § 276. As to the legitimation of such offspring, see *ante*, 238.

<sup>2</sup> § 276; 1 Bl. Com. 458. A bastard may gain a surname by reputation though none by inheritance. Co. Litt. 3. The very term "bastard," said to be derived from the Saxon words "base start," expresses contempt. See Fraser, Parent & Child, 119.

<sup>3</sup> 2 Kent, Com. 212; 1 Bl. Com. 459. This was likewise the doctrine of the civil law; the language of the Institutes as to spurious offspring, *patrem habere non intelliguntur*, dealing rather more gently with a fact so extremely delicate and painful. Inst. 1, 10, 12; 2 Kent, Com. 212. The civil law, while offering in certain cases a hope of legitimation, made a distinction between spurious offspring born of an unfettered promiscuous intercourse, and such as were conceived or born during the marriage of one of the natural parents, or were otherwise the product of a complex, nefarious, or incestuous commerce; presuming that while the former might be rendered legitimate, the latter never could become so. 1 Dig. 5, 23; Fraser, Parent & Child, 119; *ante*, 238. This principle is to be traced as to inheritance in the provisions of the Louisiana Code. See § 277.

A child born out of wedlock, but afterwards legitimated by subsequent

statutes which permit even bastard children to inherit from the father under certain restrictions; while the generally recognized doctrine is *partus sequitur ventrem*, and that the illegitimate child and his mother shall mutually inherit from each other; and while, of course, if the bastard leaves lawful issue, such issue inherit from him like any other legitimate offspring.<sup>1</sup>

**292. A natural tie connects the illegitimate child peculiarly with his mother; and thus has it been both at the civil and common law. It is usually the mother who is known and who admits herself to be the child's parent, though the father**

marriage, is an heir and distributee like the other children, and has all the rights of a legitimate child, so far as the local legislation in favor of such legitimacy can give it this universal effect. *Miller v. Miller*, 91 N. Y. 315; *Williams v. Williams* 11 Lea (Tenn.), 652. Legitimation is applied by some of our codes aside from marriage; as by adoption or formal recognition. *Ante*, 238; 44 Kan. 12; 152 U. S. 65.

<sup>1</sup> § 277; Stimson's Statute Law, §§ 3151-3154; *Grundy v. Hadfield*, 16 N. J. 579; *Opdyke's Appeal*, 49 Penn. St. 373; *Hawkins v. Jones*, 19 Ohio St. 22; *Riley v. Byrd*, 8 Head (Tenn.), 20; 8 Gill (Md.), 128; 24 Fed. (U. S.) 15; 73 Mich. 600; 169 Mo. 432; 127 Ill. 425. But cf. *Jackson v. Jackson*, 78 Ky. 390.

These statutes of inheritance are not generally to apply to grandchildren and grandparents, in a case of illegitimacy. See 64 Penn. St. 493; 5 Bush (Ky.), 452. For construction of the word "illegitimate," see 25 N. Y. Supr. 507. And see 149 Mo. 529 (issue of mixed races). An illegitimate child can administer on his father's estate as against the father's brother. 52 Cal. 84. See *Magee's Estate*, 63 Cal. 414. As to an illegitimate child unintentionally omitted from its mother's will, see 57 Cal. 484. In general, an illegitimate child, where there was no subsequent marriage of the parents, nor an adoption, cannot inherit from the putative father. As to such acts of inheritance, a child is rendered legitimate only *sub modo*. 92 Penn. St. 193. An adopted illegitimate child died, having inherited land from its adopted mother; and its natural mother was allowed to inherit on the child's death without issue. 87 Ind. 590. Adoption codes in some States would receive a different construction. See *ante*, 243. There is scarcely a State in the Union which has not departed widely from the policy of the English common law; and statutes, which happily have required as yet very little judicial interpretation, perpetuate the record of our liberal and generous public policy towards a class of beings who were once compelled to bear the iniquities of the parent. § 277.

should remain unknown.<sup>1</sup> The rights of the parents of bastards are regulated to a great extent in the United States by statute; and our policy is in general more favorable than that of England, as to the mother's superior rights.<sup>2</sup>

293. The putative father is not obliged to support his illegitimate offspring at the common law, irrespective of statute. But upon the strength of the natural or moral obligation arising out of the relation of the putative father to his child, an action at common law lies for its maintenance and support upon an express promise; and where one admits himself to be the father and adopts (so to speak), for the time being, a promise may be implied in favor of the party providing

<sup>1</sup> Code, lib. 6, 57. See 2 Kent, Com. 214. But it was only gradually that the mother was allowed at English law any privileges of custody, etc., exclusive of the putative father. § 278; Macphers. Inf. 67, 110; 5 East, 223; 5 T. R. 278; 5 Russ. 154 (chancery). As against strangers, however, or those even with whom the mother has temporarily, placed her spurious child, the maternal right to determine the young child's permanent custody has been strongly upheld, though not without regard for the child's interest. *Queen v. Nash*, 10 Q. B. D. 454. See § 278.

<sup>2</sup> An illegitimate child follows the settlement of his mother in New York and some other States. See 2 Kent, Com. 214; 17 Johns. (N. Y.) 41; 12 Mass. 429; *Lower Augusta v. Salinsgrove*, 64 Penn. St. 166; *Stimson*, §§ 6685-6688. But cf. 20 Conn. 298. In New York, again, it is broadly ruled that, as against the mother of a bastard child, the putative father has no legal right of custody; that the mother, as its natural guardian, is bound to maintain it; and that she is entitled to control it. 6 Barb. (N. Y.) 366; 15 Barb. 247. Stratagem and force on the part of the putative father furnish good grounds for restoration of the child to the mother. 6 S. & R. (Penn.) 255. And see as to Spanish and French influence, 19 Martin (La. Ann.), 387; 34 Tex. 554. In some States, the superior rights of the mother in binding out her illegitimate child are favorably regarded. 36 Ga. 440; 5 Penn. St. 269; 48 Iowa, 83; 106 Penn. St. 574. Also her superior right to the child's service, if she supports. 113 Ga. 936. But see as to a putative father, who has received the child with authority from the selectmen, 50 Vt. 158. As to the guardian's right of custody to an illegitimate orphan child, see 62 Ind. 533. And where the child has been abandoned and apprenticed out by an asylum, see 60 Ind. 394. But while a mother's superior right to custody has been held to carry a right of transfer, the child's welfare is considered paramount. *Marshall v. Reams*, 32 Fla. 499.



for it. The father can only be charged then upon his contract.<sup>1</sup>

294. A person standing in loco parentis may sue *per quod servitium* for the abduction of his daughter's illegitimate child.<sup>2</sup> Relatives more distant than parents do not, on the

<sup>1</sup> § 279; 5 Esp. 131; 3 C. & P. 36; 7 D. & Ry. 612; *Moncrief v. Ely*, 19 Wend. (N. Y.) 405; 32 Wash. 294. Claims for maintenance upon the estate of a deceased putative father are not favored, where no express and binding contract to support can be established, nor are verbal declarations readily available to show such a contract. *Duncan v. Pope*, 47 Ga. 445; *Nine v. Starr*, 8 Ore. 49; *Dalton v. Halpin*, 27 La. Ann. 382. But upon his promise to third persons he may be held liable for the child's support, past and future. *Wiggins v. Keizer*, 6 Ind. 252. The child, too, has been allowed to bring action against the father's estate to recover for such support where the father died without making the provision promised. *Todd v. Weber*, 95 N. Y. 181. The statutes, however, which relate to the maintenance of bastard children, supply the want of adequate common-law remedies; the main element in such legislation being public indemnity against the support of such persons. § 279; 66 N. C. 648; 21 Ohio St. 353; 30 Ind. 240; 32 Wash. 294; 24 Md. 383; 10 Allen (Mass.), 389. For bastardy process with bond, etc., from the putative father under various local statutes, see § 279. Some codes permit a prosecution while the woman is pregnant and regardless of the future birth of the child. 128 Ind. 397. A man who marries a woman known by him to be pregnant, becomes liable for the support of the child, and an action of bastardy will not lie against the natural father. 62 Iowa, 343.

Seduction of a female and begetting a bastard is sufficient consideration to support a man's deed or promise of maintenance. 13 S. & R. (Penn.) 29. And see 2 P. Wms. 433; *Phillippi v. Commonwealth*, 18 Penn. St. 116; *Knye v. Moore*, 1 Sim. & Stu. 161; 53 Ark. 5. The undertaking of a putative father to pay the mother money for the support of the child is not illegal. *Hook v. Pratt*, 78 N. Y. 371 (negotiable bill thus given). See 43 Mich. 37; 65 Vt. 516. But there must be nothing oppressive or unfair in such transactions. 126 Penn. St. 253; *Merritt v. Fleming*, 42 Ala. 234. Nor ought agreements as to the wages of sin to be favored. 4 B. & Ald. 650.

Whatever may be the mother's legal responsibility for the maintenance of her bastard child while she lives, it appears that an action cannot be maintained against her estate for the child's maintenance subsequently to her death. *Ruttinger v. Temple*, 4 B. & S. 491.

<sup>2</sup> § 280; *Moritz v. Garnhart*, 7 Watts (Penn.), 302. But even a parent is not bound to support the illegitimate offspring of his children. 4 N. H. 86.

whole, seem to have much consideration in matters relating to a bastard; and it is even likely that the assumption of a family name by an illegitimate member is a grievance for which the offended relatives have no redress.<sup>1</sup>

295. Requests to illegitimate children, since they are not considered as relatives, are not favored in English law.<sup>2</sup> Illegitimate children may undoubtedly take by purchase as persons designated, if sufficiently described. The question in cases of this sort is really one of intention.<sup>3</sup>

<sup>1</sup> *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430. See *Vane v. Vane*, L. R. 8 Ch. 383. A widowed mother may in a certain sense place herself *in loco parentis* to her illegitimate child. 91 Ga. 564.

<sup>2</sup> § 281; *Lowndes v. Lowndes*, 15 Ves. 304; 6 Ves. 547; *contra*, 3 Ves. 30.

<sup>3</sup> *Cro. Eliz.* 509; *Co. Litt.* 36; *Clifton v. Goodbun*, L. R. 6 Eq. 278; *Crook v. Hill*, L. R. 6 Ch. 311. *Prima facie*, the term "children" in a will, however, is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, the English rule is that no illegitimate child can take under the description of children. 2 Russ. & My. 336; L. R. 6 Eq. 599; *Paul v. Children*, L. R. 12 Eq. 16; *Dorin v. Dorin*, L. R. 7 H. L. 568. See as to "nephews," 35 Ch. D. 551. Yet, if they have acquired the reputation of being the children of a particular person, or if the will shows a clear intention to provide for such persons, already in existence, they are capable of taking under the description of "children," "sons" or "daughters." § 281; 2 De G., M. & G. 697; 16 Beav. 510; 24 Beav. 141; 19 Beav. 421. Where legitimate children alone answer to the description intended, or are sufficiently designated, they will take under the will. *Hill v. Crook*, L. R. 6 H. L. 265. And see L. R. 1 Ch. D. 229 (no evasion permitted); *Medworth v. Pope*, 27 Beav. 71. A provision for future illegitimate children has been ruled *contra bonos mores*, yet English chancery wavers on that point. *Occleston v. Fullalove*, L. R. 9 Ch. 147 (child in being before testator's death). See 3 Ch. D. 773; *Hastie's Trusts*, 35 Ch. D. 728.

In this country, the tendency seems to be so far favorable to illegitimate children in existence as to regard wills made in their favor with the same, or nearly the same, consideration as all others. And our courts regard bastards as having strong claims to equitable protection, notwithstanding the criminal indulgence of their parents. Specific performance of voluntary settlements made by the father in their favor have been decreed. § 281; 2 Paige (N. Y.), 11; 1 Johns. Ch. (N. Y.) 338; 4 Desaus. (S. C.) 139; 2 Kent, Com. 216; 4 *ib.* 413; *Collins v. Hoxie*, 9 Paige, 88; *Hughes v. Knowlton*, 37 Conn. 429. Illegitimate children cannot take under a trust limited to "lawfully begotten children." Edward's

296. As to the guardianship of an illegitimate child, testamentary guardianship is of such a nature that a father cannot by his will so appoint unless the statute gives positive permission.<sup>1</sup> The putative father of a bastard child has been considered a proper person to petition for a probate guardian, as against all except the mother.<sup>2</sup>

Appeal, 108 Penn. St. 238. But "heirs" limited to "children" may include illegitimate children under a fair construction. *Howell v. Tyler*, 91 N. C. 207. So as to a natural child *en ventre*. 5 Harr. & J. 10; *Crook v. Hill*, 3 Ch. D. 773. But whether our tribunals would sanction a bequest to unborn illegitimate children may admit of doubt, provided such child were never legitimated by subsequent marriage or adoption; for, after all, there must be some discrimination made against criminal intercourse. *Kingsley v. Broward*, 19 Fla. 722.

<sup>1</sup> *Sleeman v. Wilson*, L. R. 13 Eq. 86. But this does not prevent a court from adopting such a nomination, where no superior claimant petitions for the trust. *Ramsay v. Thompson*, 71 Md. 315. And see 147 Penn. St. 85 (simply a trusteeship).

<sup>2</sup> *Pote's Appeal*, 106 Penn. St. 574.

Guardians are of course appointed on occasion for illegitimate minors, as for instance in case such a child has a legacy. *Johns v. Emmett*, 62 Ind. 583. Or becomes an orphan. 46 N. J. Eq. 521.

## PART IV.

### GUARDIAN AND WARD.

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#### CHAPTER I.

##### OF GUARDIANS IN GENERAL; THE SEVERAL KINDS.

297. The guardian is a person intrusted by law with the interests of another, whose youth, inexperience, mental weakness, or feebleness of will disqualifies him from acting for himself in the ordinary affairs of life, and who is hence known as the *ward*. Guardianship usually applies to minor children; and in this sense the guardian may be either their natural protector, whose authority is founded upon universal law, or some person duly chosen to act on their behalf.<sup>1</sup> And since the parental control does not extend to the estate of a minor, the appointment of a guardian may be both necessary and proper, when property becomes vested in a child under age.<sup>2</sup> The law of guardianship is most naturally divided into guardianship of the person, and guardianship of the estate.<sup>3</sup> The same person is often guardian of both the person and estate

<sup>1</sup> § 283. Thus, the father (and sometimes the mother) exercises the right of custody and nurture as the child's natural guardian; while, if the parents are dead, some one must be selected to supply their place.

<sup>2</sup> Guardianship applies also at the present day to idiots, lunatics, spendthrifts, and the like; and the guardian of such person derives his authority from statute law and a special appointment. This guardian is sometimes designated as the *committee*.

<sup>3</sup> § 283. Guardianship of the person is a relation essentially the same as that of parent and child, though not without some important differences, as we shall see hereafter. Hence the guardian has been called "a temporary parent." 1 Bl. Com. 460; 2 Kent, Com. 220. A money corporation may be guardian in modern times, under appropriate

of the ward; but not necessarily, for these may be kept distinct. So, too, there may be joint guardians, as in other trusts.<sup>1</sup>

298. The law of guardianship in England has been one of irregular growth, and classification is difficult. Guardians, until chancery jurisprudence became fully developed, were recognized only for certain limited purposes. Their powers were restricted, and new classes were created from time to time, as the exigency arose. One species of guardianship would fall into disuse and another spring up in its place.<sup>2</sup> But *guardianship by nature and nurture*, *guardianship in socage*, *testamentary guardianship*, and *chancery guardianship*, require special consideration, and these will be taken up in order.

299. (1) *Guardianship by nature and nurture* denotes hardly more or less than the natural right of parents to the care and custody of their children.<sup>3</sup> Guardianship by nature and nurture belongs exclusively to the parents: first, to the father, and, on his death, to the mother. The father's right was formerly preferred to the mother's in all cases; while the modern tendency is otherwise. The authority of such guardians extends only to the ward's person; they have no right to intermeddle with his property.<sup>4</sup>

statutes, notwithstanding the ancient objections of a want of conscience or of parental feelings. 40 Minn. 7; 42 Mich. 528; § 300. Guardianship of the estate bears a closer resemblance to trusteeship; guardians and trustees being alike bound to manage estates with fidelity and care, under the supervision and direction of the probate or chancery courts.

<sup>1</sup> § 283.

<sup>2</sup> § 284; Macphers. Inf. 2 *et seq.*, to which the reader is referred for a full account of the ancient kinds of guardianship, including guardianship under Stat. 4 & 5 P. & M. c. 8, alluded to in 1 Bl. Com. 461, and repealed by 9 Geo. IV. c. 31.

<sup>3</sup> § 285; Macphers. Inf. 52, 58. See also 1 Bl. Com. 461, and Harg. notes 1 & 3; 2 Kent, Com. 220, 221. Distinctions of no practical importance at the present day were once made; the guardianship by nature lasting through the child's minority, while that for nurture ceased when the child reached fourteen. *Id.*

<sup>4</sup> § 285; 1 Bl. Com. and Harg. notes; 2 Kent, Com. 220, 221; Kline v. Beebe, 6 Conn. 494; 15 Wend. (N. Y.) 631. And see Wall v. Stanwick,

300. (2) **Guardianship in socage** arises, at common law, whenever an infant under fourteen acquires title to real estate. It applies only when the infant inherits land, and cannot exist if his estate be merely personal.<sup>1</sup> The duty of the guardian in socage is to take possession of the heir's person and real estate, to receive the rents and profits until the heir reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well. His powers are commensurate with his duties.<sup>2</sup>

301. (3) **Testamentary guardianship** was instituted by the statute of 12 Car. II. c. 24, and for this reason testamentary guardians are sometimes called *statute guardians*.<sup>3</sup> Testamentary guardianship gives the custody of the ward's person, and of all his real and personal estate; and it embraces not only such property as comes to the ward through descent, devise, bequest, or inheritance from the father, but all that he may acquire from any person whomsoever, and whether real or personal.<sup>4</sup>

34 Ch. D. 763 (rents and profits of land). The general right of a parent is to this effect, *ante*, 268.

Guardianship by nature and nurture yields to every kind of guardianship which exists by strict appointment, so far as the ward's property is concerned, though not necessarily as to his person. § 235.

<sup>1</sup> 1 Bl. Com. 461, and Harg. *n.*; 2 *ib.* 88; 2 Kent, Com. 220; 1 P. Wms. 285; Macphers. Inf. 20 *et seq.*; 3 Ad. & El. 597; 10 East, 491; 5 Nev. & M. 353.

<sup>2</sup> § 236. Guardianship in socage has passed into disuse, though it cannot be said to have been absolutely abolished.

<sup>3</sup> And see 31 Geo. III. c. 32; 1 Vict. c. 26; *Corbet v. Tottenham*, 1 Ball & B. 59; § 237; 1 Bl. Com. 462. "Statute guardianship" is not an appropriate term, since local statutes at this day define all guardianship considerably. The father may thus by his will appoint (or at least nominate) guardians for his minor child or children surviving him, for a term not exceeding a child's minority. But a mother cannot appoint, nor a putative father, nor a person *in loco parentis*, unless modern legislation so provides. § 237; Macphers. Inf. 83-91; 1 Bl. Com. 462; Harg. *n.*; Vaugh. 180; 3 Atk. 519; *Earl of Ilchester, Re*, 7 Ves. 367; *Describes v. Wilmer*, 69 Ala. 25.

<sup>4</sup> § 237. This shows that the guardian's interest is derived not from the father, but from the law itself, for the father could give him no interest over that which was never his own. Testamentary guardianship, as now

302. (4) *Guardians by appointment of a court of equity, or chancery guardians*, as they are termed, have, within the last century or more, assumed such importance as almost to supersede, in the English practice, these other kinds, except perhaps the testamentary guardian.<sup>1</sup> Whatever may be the origin of the jurisdiction by virtue of which courts of chancery appoint guardians in such cases, the right of making such appointments, and in general of controlling the persons and estates of minors, has long been firmly established, and cannot at this day be shaken.<sup>2</sup> As to the general jurisdiction of chancery over infants, it may be observed that, in the appointment and removal of guardians, in providing suitable maintenance, in awarding custody of the person, and in superintending the management and disposition of estates, the chancery court wields large powers for the benefit of the young and helpless.<sup>3</sup> Chancery guardians are, in general,

understood, was unknown to the common law. § 287; 7 Ves. 370. Cf. Co. Litt. 87 b; Co. Cop. § 23.

<sup>1</sup> § 283. The earliest known instance of such an appointment occurred in 1696. See Co. Litt. 88 b; Harg. n. Blackstone speaks of the practice in his day as applicable chiefly to guardians with large estates, who sought to indemnify themselves and to avoid disagreeable contests with their wards, by placing themselves under the direction of the court of chancery. 1 Bl. Com. 463. The origin of this guardianship is obscure. Some have considered it an usurpation; while others assert that the jurisdiction thus exercised over infants flows from the general authority of a court of chancery, as delegated by the crown. This latter view has met with the best judicial approval. § 304; 2 Bro. C. C. 499; 10 Ves. 52.

<sup>2</sup> § 283. An infant is constituted a ward in chancery whenever any one brings him in as party plaintiff or defendant, by a bill asking the directions of the court concerning his person or estate, or the administration of property in which he is interested. Macphers. Inf. 103; Ambl. 302, n. In this character he is treated as under its special protection. Where a suit is pending, the court appoints a guardian of *the person* only; in other cases a guardian of *the person and estate*. *Ib.* 105. So chancery will appoint a guardian on petition, where testamentary guardians decline to act; and, if necessary, determine on petition the right of a guardian already appointed. *Ib.* 104.

<sup>3</sup> § 283.

This jurisdiction, being clear of technical rules and dependent upon the discretion of the Chancellor, adapts itself far more readily to the

only appointed where there is property; but this is because guardianship can scarcely be necessary otherwise.<sup>1</sup>

**303. Guardianship by election of the infant** deserves a passing notice.<sup>2</sup> The practice in the English spiritual courts was to permit the minor, when of suitable age, to nominate his guardian, subject to its approval.<sup>3</sup> The infant, above the age of fourteen, is still permitted to nominate his guardian before the court of chancery; but his nomination does not supersede the authority of the court.<sup>4</sup>

**304-6. Guardianship in the United States** differs considerably from guardianship in England. Here the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians found in American practice, though some of the more important classes are recognized to a limited extent.<sup>5</sup>

various grades of society, the intention of testators, the wants and wishes of the infants themselves, and the different varieties of property, than all the other guardianships combined. By compelling trust officers to give security, to invest under its direction, and to keep regular accounts, the court exerts a wholesome restraint on the ward's behalf, while at the same time it arms the guardian against all attacks of a capricious heir, by affording its sanction to his official acts.

<sup>1</sup> *Wellesley v. Duke of Beaufort*, 2 Russ. 21. Hence persons desiring to call in the authority of the court for the protection of an infant sometimes resort to the expedient of settling a sum of money upon him. *Macphers. Inf.* 103. The great objection to chancery guardianship is its expense; and the lavish outlay of money which becomes requisite at every step renders the practical benefit to the minor often questionable. Less cumbrous machinery (as in the United States) would remedy this evil. As to chancery jurisdiction in the case of minor children without property who need protection, see *Scanlan, Re*, 40 Ch. D. 200; *McGrath, Re*, (1898) 1 Ch. 143. Late English statutes are in aid of such power. § 238

<sup>2</sup> The infant in socage had the right of choosing a guardian at the age of fourteen. This age was recognized also as the limit to guardianship by nurture; the law choosing to yield somewhat to the ward's discretion thenceforth. § 239; *ante*, 299.

<sup>3</sup> 1 Bl. Com. 461; Co. Litt. 88 b; Harg. n. 16.

<sup>4</sup> *Macphers. Inf.* 74, 78. Guardianship by election of the infant has thus become a misnomer, for he does not absolutely elect. § 239. And see § 301, *post*.

<sup>5</sup> § 290. Thus guardianship by nature and nurture, or the parental right of custody, prevails in most of the States with the restraints upon meddling



**307.** We have testamentary guardians, with essentially the same powers and duties as in England. The statute of 12 Charles II. has been enacted in most of the United States, with the language somewhat changed, and no religious disabilities permitted.<sup>1</sup> And not uncommonly is it found in America that testamentary guardians can only be appointed by a will executed with the usual solemnities.<sup>2</sup>

**308.** American chancery and probate guardians are chiefly to be here considered. The supreme courts in many States have

with a child's property already noticed. *Ante*, 268, 269. But here as in England, intermeddling with the ward's property subjects the parent to the quasi guardian's liability. *Bedford v. Bedford*, 136 Ill. 354. See *Macready v. Wilcox*, 83 Conn. 321. Local statutes sometimes confirm this right. That the grandfather or grandmother, when next of kin, may, on the death of father or mother, be guardian by nature, see 15 Ga. 414; *Lamar v. Micou*, 114 U. S. 218, 222. Guardianship in socage was never common in the United States. But traces of its existence are to be found in New York and New Jersey. 5 Johns. (N. Y.) 66; 7 Johns. 157; *Graham v. Houghtalin*, 1 Vroom (N. J.), 552; *Emerson v. Spicer*, 46 N. Y. 594. The powers and duties of the guardian in socage, where recognized in this country, have been limited to the ward's real estate, with personalty connected therewith, as animals and farm implements, and do not extend to the ward's general personal property. *Foley v. Mutual Life Co.*, 138 N. Y. 333 (and so at common law). And all such rights are superseded by those of an ordinary legal guardian. *Stimson*, § 1103; *Hynes, Re*, 105 N. Y. 560.

<sup>1</sup> § 290. For precise modifications the practitioner should consult his local code.

<sup>2</sup> See 2 Kent, Com. 225, 226; 2 Edw. Ch. (N. Y.) 202; 55 How. Pr. (N. Y.) 494; *Vanartsdalen v. Vanartsdalen*, 14 Penn. St. 384; *Wardwell v. Wardwell*, 9 Allen (Mass.), 518. The father's right alone has regular regard. A mother has no power to appoint unless the statute is explicit. 2 Tenn. Ch. 27. But it is sometimes explicit. 77 Hun (N. Y.), 201 (surviving parent). Grandparents are not included. 5 Johns. Ch. (N. Y.) 278. The appointment does not take effect until the parent's death. 84 Cal. 592. As to a divorced parent, see 37 Tex. 731; 49 Md. 450. Concerning the testamentary guardianship of illegitimate children, see *ante*, 296. See further c. 2.

The English principle prevails, that the testator can appoint a guardian over his own children only; the right extending, however, to posthumous offspring. He cannot appoint guardians for other children, though he give them his property. *Brigham v. Wheeler*, 8 Met. (Mass.) 127; 2 Kent, Com. 225. But adoption may perhaps carry the right.

now full chancery powers, as in England, over the persons and estates of infants. But English chancery jurisprudence is one thing, and that of the United States another. While in one country the appointment, removal, and general supervision of guardians belong immediately to the equity courts, in the other a special tribunal<sup>1</sup> is usually created by local statute for such matters. It is this special tribunal—somewhat resembling the English ecclesiastical court—which alone originally issues letters of guardianship, revokes them, and superintends trust accounts in the first instance. The guardians thus chosen (*or probate guardians*) have, in general, the rights and duties of chancery guardians of the person and estate.<sup>2</sup>

<sup>1</sup> A local county tribunal usually, as in the probate of wills.

<sup>2</sup> § 291. The propriety of distinguishing between chancery guardians and those appointed by the special courts of this country—whether known as the probate, orphans', ordinary's or surrogate's court—is obvious when the origin of our probate jurisdiction is considered. At the time America was colonized, chancery guardianship was unknown in England; but the ecclesiastical or spiritual courts, independent of all temporal authority, controlled the estates of orphans and their deceased parents. The necessity of some tribunal with probate jurisdiction was soon apparent to our ancestors; but, rejecting the idea of a church establishment, they distributed probate and equity powers among the common-law courts. Their judicial system was at first simple: that of local county courts with a supreme tribunal of appeal. With the growth of population came a division of these powers in the inferior courts. New county tribunals were erected for business appertaining to estates of the dead, testamentary trusts, and the care of orphans; a blending, as it were, of ecclesiastical and equity functions. The old county courts were left to their common-law jurisdiction, while the supreme tribunal retained control over them all, exercising appellate powers in common law, equity, and ecclesiastical suits. Such, in a word, is the general origin of guardianship by judicial appointment in this country. § 291.

We shall apply in these pages, for want of something better, the distinguishing term *probate guardians*, this being sufficiently precise and suggestive; though it is admitted that the appointing power is not lodged in tribunals styled probate courts in every State, nor necessarily separated from courts exercising common-law functions. § 291. And see *ib.*, as to other less desirable terms applied, which fail to keep in view the chancery guardianship proper, and this essential guardianship of local statute

309. Guardianship at the civil law distinguished the tutor and curator of a young child. During the first period of infancy<sup>1</sup> the guardian was called *tutor*, and the children *pupils*. During the second period the guardian was called *curator*, and the children *minors*; the *curator* being appointed with special reference to the management of property.<sup>2</sup>

310. Guardians for idiots, lunatics, and spendthrifts are found at our law, though this subject comes hardly within the present scope.<sup>3</sup>

311. Besides the guardians thus classified, there are guardians created by law for special purposes, or upon special considerations. All such guardians derive their sole authority from local statutes, and, having performed the duty prescribed,

creation, which now prevails in the United States. Cf. 2 Kent, Com. 226; 1 Grant (Penn.), 55.

<sup>1</sup> Or until the age of fourteen in males and twelve in females.

<sup>2</sup> § 293; Story, Conf. Laws, § 493. The same general divisions are to be found in the law of continental Europe at the present day, though modified somewhat; also in Scotland; also in Louisiana and other parts of this country, which were formerly under French and Spanish dominion. Fraser, Guardian and Ward, 145; Duncan v. Crook, 49 Mo. 116. For other analogies at the civil law, see § 293; 111 La. Ann. 937.

<sup>3</sup> § 293; 2 Story, Eq. Juris. §§ 1335, 1336; 1 Bl. Com. 303; 3 P. Wms. 108. In England chancery exercises jurisdiction in the appointment and supervision of guardians (or committees) of the insane. 1 Bl. Com. 306; 16 & 17 Vict. c. 70; 7 Ves. 591. Guardians of insane persons are appointed in this country; but in general by the courts exercising jurisdiction in case of minors, which derive also their authority from local statutes. § 293; 16 Ohio St. 455; 11 R. I. 187. Where one cannot manage his own estate because of mental unsoundness, the appointment is generally authorized without reference to the cause of such unsoundness. Robertson v. Lyon, 24 S. C. 266; Barbo v. Rider, 67 Wis. 598; 108 Ind. 545. The general guardian's right is subject to the superior right of the State to put the ward into an asylum. 17 R. I. 37. The civil law likewise assigned tutors and curators to such persons. 1 Bl. Com. 306.

Guardianship for spendthrifts was something recognized by the civil law. Such guardianship is, however, unknown in England, and Blackstone considered it unsuitable to the genius of a free nation. 1 Bl. Com. 306. It has nevertheless been introduced into several of the United States, and the local statute is to be strictly followed. § 293.

they have no further concern with the ward. Nor do they act except in default of a general guardian.<sup>1</sup>

312. Finally, there is the guardian *ad litem*, who is simply a guardian for a special purpose; being one chosen to represent the ward in legal proceedings to which he is a party defendant, and where he has no general guardian to appear on his behalf. Where the ward is plaintiff he appears by next friend. In either instance the father's natural right is respected.<sup>2</sup>

<sup>1</sup> §§ 294, 295. As for insane married women in special cases, to manage property or release dower, etc. See *ib.*, as to public charitable officers sometimes styled "guardians," or temporary appointees authorized for an emergency. And see 15 Mich. 226; 52 Barb. (N. Y.) 622; 57 N. Y. 286; 50 Tex. 302; 31 La. Ann. 50.

<sup>2</sup> § 296. See *Woolf v. Pemberton*, 6 Ch. D. 19. The powers and duties of guardians *ad litem* are similar in England and the United States. § 296; Macphers. Inf. 358; 2 Kent, Com. 229. See *Infants, post*, Part V. c. 6. A guardian *ad litem's* special functions in a suit are not superseded by the appointment of a general (insane person's) guardian. 79 Wis. 465.

## CHAPTER II.

### APPOINTMENT OF GUARDIANS.

**313. Guardians derive their authority either from the law or a special appointment.** And all guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.<sup>1</sup>

**314. Guardians by nature and nurture act under authority of the law,** which designates, first, the father; and, after his death, the mother. These are the only natural guardians possible, apart from legislation.<sup>2</sup> The mother is considered the natural guardian of a bastard, in this country, as against its putative father;<sup>3</sup> though the common law regarded such children as without a natural guardian.<sup>4</sup> On principle, it would seem that the natural guardianship of a child is shifted to the mother when custody is awarded her because of her husband's personal unfitness.<sup>5</sup>

**315. Testamentary guardianship is the only recognized instance of authority derived from parental appointment.** Guardians thus appointed require at the old law no further qualification; not even the probate of the will which appoints them.<sup>6</sup> But

<sup>1</sup> § 297.

<sup>2</sup> § 298; 1 Bl. Com. 461; 2 Kent, Com. 220; Macphers. Inf. 52; 5 Gill & Johns. (Md.) 27; 111 La. Ann. 937; 2 Root (Conn.), 320.

<sup>3</sup> 2 Mass. 109; 8 N. H. 417; 6 Barb. (N. Y.) 366; 6 Blackf. (Ind.) 357.

<sup>4</sup> Macphers. Inf. 67; *ante*, 292.

<sup>5</sup> § 298. The modern tendency is to regard both husband and wife as guardians, by nature, of their own children, at the same time that this gives no right to control a child's property without a legal appointment such as we shall presently notice. See *ante*, 268, 269; 39 Barb. (N. Y.) 307.

Socage guardians also derived their authority from the law, and not from a special appointment. 2 Kent, Com. 223. *Ante*, 306.

<sup>6</sup> § 299; 8 Met. (Mass.) 127; 2 Edw. Ch. (N. Y.) 118. See 7 Ves. 365; 3 Phillim. 222. The validity of the testamentary appointment being

testamentary guardianship exists in this country chiefly by force of local statutes, which also regulate the form and authentication of wills.<sup>1</sup>

**316.** Testamentary guardians may be appointed "either in possession or remainder," to use the old statute expression; that is, successors in the guardianship may be designated. So they may be authorized to act during the full term of the infant's minority or for a less period.<sup>2</sup> In other words, the testator is allowed a liberal discretion in his selection and in limiting authority. The paper which creates a person testamentary guardian becomes thus the test of his official powers and responsibility.<sup>3</sup>

in dispute, a court of common law over a question of custody has directed an issue in order to establish the same. *In re Andrews*, L. R. 8 Q. B. 158.

<sup>1</sup> Probate of the will is thus made often a pre-requisite, and the appointment itself becomes subject to the approval of the court, even to the extent of requiring the person appointed to qualify with or without sureties. See *Taylor, Re*, 3 Redf. (N. Y.) 259; 96 N. W. 950; 104 Ill. 369. As to the formalities of the will appointing, etc., cf. 16 Ves. 187. But see *Marshall, C. J.*, in *Gaines v. Spann*, 2 Brock. (U. S.) 81; *Wardwell v. Wardwell*, 9 Allen (Mass.), 518. A testamentary guardian can only be appointed by an instrument admitted to probate, which names such person, and indicates that he is to have the care and nurture of the infant. *Desribes v. Wilmer*, 69 Ala. 25.

It is sometimes difficult to determine what language will constitute testamentary guardianship. The old statute uses the words "custody and tuition" in reference to the children; and such assignment of the children as confers, expressly or by implication, a power thus extensive, ought to suffice. See 1 Bradf. (N. Y.) 208; 69 Ala. 25; *Miller v. Harris*, 14 Sim. 540. See *Mendes v. Mendes*, 1 Ves. 89; s. c. 3 Atk. 619. And in general testamentary guardians need not be expressly designated as such; albeit, in order to constitute them by implication, the powers essential to the office must be conferred. *Gaines v. Spann*, 2 Brock. (U. S.) 81; 2 Dev. & Batt. Eq. (N. C.) 325; *Johnstone v. Beattie*, 10 Cl. & Fin. 42; 12 N. H. 487; 90 Ga. 236. See further *Bedell v. Constable*, Vaugh. 177; 11 Leigh (Va.), 414; *Dunham v. Hatcher*, 31 Ala. 483; *Hawley, Re*, 104 N. Y. 250 ("guardians and trustees").

<sup>2</sup> § 300. And see *Parnell, Goods of*, L. R. 2 P. & D. 379; *Macphers. Inf.* 82.

<sup>3</sup> Letters of guardianship from the chancery or probate court give such appointment no additional force, unless required by statute. In fact,

**317. Guardianship by sole appointment of the infant** cannot now be said to exist. But at the common law it arose, when the heir above the age of fourteen chose to supersede his guardian in socage, by one of his own choice, under a deed of appointment.<sup>1</sup> Infants have still the privilege of nominating, though not of appointing, a guardian in court, after arriving at such an age; and if judicially sanctioned, their choice is good.<sup>2</sup>

such letters, however regarded in the guardian's dealings with strangers, are, as a rule, and independently of positive statute expression, issued without jurisdiction. 9 Watts (Penn.), 169; 15 Cal. 226; 12 Ill. 424; 20 N. H. 284. See Macphers. Inf. 84, 86; 18 Tex. 700. But statutes may provide that letters of guardianship shall issue to a testamentary guardian who must first qualify. 3 Redf. (N. Y.) 259. If the testator's will prescribes that the wife shall be testamentary guardian of the children, "as long as she shall remain his widow," her authority ceases on her remarriage, and a new appointment becomes necessary. 1 Bradf. Sur. (N. Y.) 208; *Holmes v. Field*, 12 Ill. 424. And see 31 Barb. (N. Y.) 430. In general, a firm cannot be made testamentary guardian of an infant; nor could formerly a corporation. See Macphers. Inf. 109; 4 Ves. 644. But see as to fiduciary corporations duly chartered, 42 Mich. 528; 4 Redf. (N. Y.) 66; 40 Minn. 7. The testator's power of appointment extends to all his lawful children surviving at his decease, being still minors and unmarried. Posthumous children are, likewise, included. And the testator's appointment of his wife as testamentary guardian is not revoked by the birth of such issue, subsequent to the execution of the will or testamentary deed appointing her. *Hollingsworth's Appeal*, 51 Penn. St. 518; 2 Bro. C. C. 538; Macphers. Inf. 87. A testator cannot appoint a testamentary guardian except to his own children; but an attempt to appoint one for others may create a trust. *Camp v. Pittman*, 90 N. C. 615; § 300. See 117 Ga. 993.

<sup>1</sup> *Ante*, 305; Co. Litt. 89 a.

<sup>2</sup> § 301. As to appointment of chancery guardians, see 3 Atk. 519; Macphers. Inf. 78, 109; 2 Ves. 470; 13 Sim. 639. Statutes giving the right of selecting their own probate guardians to infants above fourteen have been enacted throughout the United States; but the extent of this privilege is not uniformly prescribed. 15 Gratt. (Va.) 74; 8 Ind. 307; 14 Ga. 594; 1 Grant (Penn.), 55; 30 Miss. 458; 3 Dana (Ky.), 599; *Palmer v. Oakley*, 2 Doug. 433; 62 N. H. 440. Yet the ward cannot supersede a testamentary or a chancery or a probate guardian, properly appointed, unless authorized to do so by a positive statute. *Dyer's Case*, 5 Paige, Ch. 534. Having once exercised his right of choice, he is bound by the appointment, and cannot nominate again, as his fancy pleases.

**318.** Chancery and probate guardians, subject to the above qualification, are created in strictness by the special appointment of a court exercising competent jurisdiction. And in discussing this subject of judicial appointment we shall consider, (1) the tribunal which appoints; (2) the persons properly appointed; (3) the method of appointment; (4) the effect of the appointment.<sup>1</sup>

**319.** (1) As to the tribunal which appoints, guardians in England are appointed by the court of chancery in the exercise of its powers. Chancery guardians have been appointed in this country, but not frequently; and county or district courts of probate jurisdiction at the present day generally act in the first instance, issuing letters of guardianship, as well as of administration, under their official seal.<sup>2</sup> Two important elements enter into this jurisdiction over the ward,—possession of property and actual residence within the judicial limits.<sup>3</sup>

Lee's Appeal, 27 Penn. St. 229. See also 28 Barb. (N. Y.) 299. But local statutes vary on such points. The court has sometimes regarded the wishes of a child under fourteen where the scales are balanced; but only at its ample discretion. 91 Ga. 90. In any event the court must sanction the infant's selection, and issue letters before the guardian can act; so that this is guardianship by appointment rather of the court than of the infant, but not of course by judicial appointment at arbitrary discretion. Adams's Appeal, 38 Conn. 304. And see next chapter; 1 Dem. (N. Y.) 152. Upon the choice of an unobjectionable person the court should appoint. *Id.*

<sup>1</sup> § 302.

<sup>2</sup> § 303. The statute rule and designation may vary in different States; such as the judge of probate; or the surrogate; or the orphans' court or the ordinary; or some county or district court, with chancery powers. In a few States the chancery and county courts have exercised a sort of concurrent jurisdiction. See § 303; 2 Kent, Com. 226, 227, and notes.

<sup>3</sup> Property in the infant has usually been deemed essential in chancery practice. Macphers. Inf. 103. But cf. 2 Ph. 247; 30 Ch. D. 324; 40 Ch. D. 200; [1893] 1 Ch. 143. In the United States letters issue to probate guardians, whenever there is occasion for their appointment, the statute rarely prescribing narrower limits to the judge's authority. But statute and practice generally have reference to cases of property. § 303; 31 Barb. (N. Y.) 430.

Where the ward is a non-resident, guardianship is frequently rec-



320. The infant's place of residence at the time when a guardian is to be appointed determines generally the jurisdiction of the court. Hence the county court which appointed the first guardian of a ward may not always appoint his successor.<sup>1</sup> The last domicile of a father is on his death the domicile of his minor children, where application for guardianship should primarily be made.<sup>2</sup> The court of chancery ex-

ognized for the collection and preservation of his estate in the jurisdiction; and in such cases the existence and *situs* of the property determine the right of jurisdiction. *Clarke v. Cordia*, 4 Allen (Mass.), 466; *Rice's Case*, 42 Mich. 528. This jurisdiction is often conferred by statute as to personal property. *Ib.* So, too, as to real property at the local *situs*, or to either real or personal property. 45 Ind. 360; 3 Sawyer (U. S.), 353. Such statutory authority as to non-residents is valid. 29 Minn. 27. And it only applies to a non-resident's local property, and cannot extend to his person. 45 Minn. 380. See 40 Minn. 254 (land of a non-resident infant to be sold). Such cases serving some special emergency, a general guardian need not invariably be first appointed where the ward is domiciled. 45 Minn. 380. In case of a concurrent jurisdiction, as where a non-resident has property lying in different counties, the court which first proceeds may retain jurisdiction. 67 Cal. 643.

Far more important is the requirement of an actual residence within the jurisdiction; especially for a general guardianship and in States where the authority of courts with probate jurisdiction is strictly limited to their respective counties. Letters of guardianship, in the case of a resident person, obtained in the wrong county are invalid; it has even been held that they are null and void, and may be collaterally impeached in any court. 6 J. J. Marsh. (Ky.) 198; 26 Conn. 273; 16 Ala. 759; 9 Tex. 109; 27 Mo. 280; 43 Miss. 392; 57 Miss. 229. Letters once properly issued in the proper county of residence are not revoked by the ward's removal to another jurisdiction. 74 Ga. 539; 130 Ala. 633; 76 Me. 301. Where a new appointment becomes necessary, next to the inquiry whether the party is a minor or otherwise legally subject to guardianship at all, is the determination of his actual residence. But, as already observed, property may give jurisdiction in some cases where the ward resides abroad. Nor does non-jurisdiction make everything void to the extent of relieving one from liability who has acted as guardian and received property in that capacity, since one may be a *quasi* guardian, and be estopped by his own acts. § 303; 80 Penn. St. 167; *post*, § 326.

<sup>1</sup> *Harding v. Weld*, 128 Mass. 587; 2 Bradf. (N. Y.) 214. And see *Ross v. Southwestern R.*, 53 Ga. 514; *Hubbard, Re*, 82 N. Y. 90. See as to domicile, *ante*, 242; *post*, cs. 4, 5.

<sup>2</sup> *Wells v. Andrews*, 60 Miss. 373. See *Lamar v. Micou*, 114 U. S. 218 (grandparents).

ercises a large discretion. Its authority over the persons and estates of infants, idiots, and lunatics cannot be questioned elsewhere; and no tribunal short of the legislature can interpose a check upon its powers. But it is different with probate courts; for their jurisdiction is founded upon local statutes, maintained in derogation of the common law, made subject to the supervision of supreme tribunals, and confined to the exercise of special powers sparingly conferred.<sup>1</sup>

321. (2) In selecting the proper person as guardian, the judge is allowed to exercise a liberal discretion, and his decision will not be disturbed on appeal except for good and sufficient cause. Such is the rule both in England and America.<sup>2</sup> But this discretion is not an arbitrary one; it must be exercised in conformity with certain fixed principles.<sup>3</sup>

<sup>1</sup> From the fact that the English equity courts are unfettered in their authority, chancery courts in this country incline to the same direction; hence they construe strictly the powers of the probate courts, while maintaining their own; a matter of little difficulty, since the supreme authority is in their hands, whether in matters of probate, equity, or common law. § 303. See, *e. g.*, as to insane persons and spendthrifts, 30 Vt. 177; 26 Conn. 273; 5 Conn. 357; 1 Sneed (Tenn.), 453; 49 Me. 269. And see, as to minors, *Horsford, Re*, 2 Redf. 168. There are many local statutes relating to the appointment of guardians over persons of unsound mind, whose consideration is foreign to our present purpose. 90 Ind. 417; 53 Wis. 612, 625; 61 N. H. 261; 58 Mich. 549. The jurisdiction of a probate court to appoint such guardians is wholly statutory, and the formalities of the statute should be carefully observed. 59 Mich. 624. See 36 Ohio St. 460 (both grounds).

As to appointing where testamentary guardianship fails, see 81 Barb. (N. Y.) 430; *Judge of Probate v. Hinds*, 4 N. H. 464; § 303. Colorable and false jurisdiction does not avail. 82 N. Y. 90. See 29 Wis. 383.

In general, whether a guardian shall be appointed or not for an infant is a matter resting in the sound discretion of the court; for an appointment is made on the supposition that occasion at least exists for making it. *Vandewater, Re*, 115 N. Y. 669; *Newton v. Janvrin*, 62 N. H. 440; 89 Tenn. 63.

<sup>2</sup> § 304; *Kaye's Case*, L. R. 1 Ch. 387; 4 Dev. (N. C.) 294; 7 Barb. (N. Y.) 640; 22 Ark. 367.

<sup>3</sup> If the judge appoint without giving reasonable notice, so that parties interested have not a fair opportunity to be heard upon the petition, his appointment may, according to the better practice, be set aside on appeal at the instance of an aggrieved party. *Underhill v. Dennis*, 9

**322.** Most frequently the court's discretion is to be exercised, whether in chancery or probate appointments, in cases where the child is fatherless, and moreover too young to nominate for himself. Who, then, shall be selected? The mother, if living and competent for the trust, would appear to be the most suitable person, unless remarried, and so in fact is she usually considered in this country.<sup>1</sup> The leading considera-

Paige (N. Y.), 202; Bowles v. Dixon, 32 Ark. 92. A maternal grandparent ought not to be appointed without notice to the paternal grandparent, if there be one. 4 Redf. (N. Y.) 306. See 37 N. J. Eq. 245, 251; 58 N. H. 15. The statute may be found mandatory on this point.

Since the substitution of chancery and probate wards in practice for socage wards, guardianship of the minor in the father's lifetime has frequently been sought in the courts. § 304. Cf. 3 Bl. Com. 427; 2 Kent, Com. 220. But the English chancery reluctantly interferes with a living father's rights in such cases. § 304; 2 Moll. 210; 12 Jur. 713; Ball v. Ball, 2 Sim. 35.

The great difficulty which thus arises where guardianship is sought by a stranger, namely, that a father's custody of his own children is thereby disturbed, has been frequently obviated in this country by statute; so that while the father is living, probate guardians are limited in powers to the infant's estate, and do not conflict with the parental right to the ward's person. § 304; 23 Barb. (N. Y.) 464. But see 7 J. J. Marsh. (Ky.) 501; 2 Ala. 529; 46 N. J. Eq. 521 (jurisdiction of probate guardians confined to orphan children). A father who is alive is not usually bound by proceedings for the guardianship of his child, to which he was not a party. Bowles v. Dixon, 32 Ark. 92; Tong v. Marvin, 26 Mich. 35. But see 58 N. H. 15. A minor child, inheriting from his mother, or otherwise acquiring property independently of the father, may at this day require a guardian to collect and hold such property for him; and while ordinarily a father will be appointed probate guardian of his motherless child, such appointment will be refused in our practice where it is apparent that he is an unsuitable person and that the child's best interests require some one else appointed, whether on the father's nomination or adversely to him. Heinemann's Appeal, 96 Penn. St. 112; 2 Dem. (N. Y.) 4; 58 N. H. 15; Prime v. Foote, 63 N. H. 52. Immoral or undutiful conduct may disqualify even a father. 106 Wis. 315; 96 Penn. St. 112.

<sup>1</sup> § 305. English chancery practice appears less favorable to her claims, exclusive of the next of kin. Macphers. Inf. 112; 6 E. L. & Eq. 47; 17 E. L. & Eq. 90; 21 E. L. & Eq. 524. In this country it is not uncommon to find guiding principles indicated by the local statute. Thus, the mother, and, after the mother, the next of kin of an infant

tion for the court should be the interest and welfare of the child; and this, which becomes almost the only rule of choice between distant kindred, may control even the selection of the father himself.<sup>1</sup> In general, it is the duty of the court to regard the character of the person who applies for letters of guardianship; the influence he or she is likely to exert, and, if the estate be difficult to manage, one's business qualifications and financial standing.<sup>2</sup>

under fourteen is entitled to preference, and such claim cannot be disregarded unless for some satisfactory reason. *Albert v. Perry*, 1 McCart. (N. J.) 540. Access of the mother to the child may be made a condition where a third person is appointed. 4 Dem. (N. Y.) 295. And see 1 Green, Ch. (N. J.) 78; 25 Miss. 29; 22 Barb. (N. Y.) 178; 20 Wis. 507; 52 Tex. 1; 3 Bush (Ky), 74; *Lord v. Hough*, 37 Cal. 657. See *Gloucester v. Page*, 105 Mass. 231 (peculiar facts). It is not proper for a court to appoint a mother, and, upon her failure to give bond, appoint a stranger without notice to her. 37 N. J. Eq. 251. A greater latitude is allowed the court, as between relatives having no legal claim to the services of the child and the natural guardian; and reasons which might be deemed insufficient to bar the mother's rights might decide as between other relations. 1 McCart. (N. J.) 540.

<sup>1</sup> 2 Gill (Md.), 241; 27 La. Ann. 271; 11 Nev. 87; *Janes v. Cleghorn*, 63 Ga. 335; *Vandewater, Re*, 115 N. Y. 669. Late English courts show an increasing regard for the child's welfare. *Violet Nevins, Re*, [1891] 2 Ch. 299. And see 3 Bradf. 409. If the child is fatherless, and the mother's manner of life would be likely to exercise an unfavorable influence, she will not be appointed, nor will her wishes have much weight. *Albert v. Perry*, 1 McCart. (N. J.) 540; 37 La. Ann. 546. Nor is the appointment of an executor or administrator desirable, if a conflict of interests be thereby created. 3 Yerg. (Tenn.) 336; 12 Mass. 17. Nor the selection of a stranger, when the next of kin can be had, unless the parent expressly desires it. 1 Moll. 225; 2 Atk. 315; 10 S. & M. (Miss.) 624. As to religious views, see 9 Paige (N. Y.), 202; *Voullaire v. Voullaire*, 45 Mo. 602. See further 2 Barb. Ch. (N. Y.) 216; 78 S. W. 833 (statute preference of public administrator for guardian of a non-resident's property).

<sup>2</sup> § 305.

No fanciful reasons should be allowed to determine the selection of the court between distant relations. The family line of inheritance is not material here. 9 Paige (N. Y.), 202; 1 McCart. (N. J.) 540. See 58 N. H. 15. But the fact that the child has always been in the charge of his relatives on one side is entitled to weight. 1 McCart. (N. J.) 540. If children are already in a good home, this is a reason why they should not be disturbed, but a mother's consent should not be extorted from her. *Id.*

323. As concerns the right of a married woman to be appointed guardian, there is doubt and uncertainty.<sup>1</sup> In spite of the liberal tendency of the age, we conclude that while such guardianship would not be deemed absolutely void, and is in fact sometimes sanctioned without investigation, public policy is decidedly against the appointment unless that public policy changes through legislative expression.<sup>2</sup> Persons residing out of the jurisdiction will not usually be appointed guardians, although one who was out of the State might yet control from a distance; for, it is said, there must be some one answerable to the court.<sup>3</sup>

The separation of young children from one another is to be avoided, unless in other respects desirable. 4 Redf. (N. Y.) 299.

On general principle the death-bed wishes of the father or his informal testamentary expression should be considered by the court; so those of the mother, in States where the mother's choice is favored at all. 31 N. Y. Supr. 207; *Kaye's Case*, L. R. 1 Ch. 387; *Cozine v. Horne*, 1 Bradf. (N. Y.) 143; *Watson v. Warnock*, 31 Ga. 716; *Turner, Re*, 4 C. E. Green (N. J.), 433; 11 Nev. 87. See *Cleghorn v. James*, 68 Ga. 87. Such wishes are not conclusive upon the court; and yet they may sometimes be sufficient to turn the scales. § 306.

<sup>1</sup> When it is considered that chancery and probate guardians are a modern creation, the ancient cases, from such species of guardianship as are now extinct, are hardly worth looking after. There are cases which sustain the acts of married women while acting as guardians, or rather *quasi* guardians; at the same time clear precedents for their actual appointment are wanting. 13 Ves. 517 (case of an illegitimate child).

<sup>2</sup> § 306; *Kaye, Re*, L. R. 1 Ch. 387; *Macphers. Inf.* 111; 8 Sim. 346; 1 Beav. 347. See further, *Jarrett v. State*, 5 Gill & Johns. (Md.) 27; 29 Miss. 195; 1 Paige (N. Y.), 488; 19 Ind. 88. Recent statutes in various States now empower a married woman to serve as guardian, besides so increasing her powers and liabilities as to obviate former objections concerning liability under bond and management of trust property. *Beard v. Dean*, 64 Ga. 248; *Goss v. Stone*, 63 Mich. 319.

The English rule has been, on the marriage of a female guardian, to choose another in her stead. *Logan v. Fairlee, Jacob*, 193. But see 2 Dem. (N. Y.) 1, overruling 1 Redf. (N. Y.) 333; 68 N. Y. S. 629. And see 34 So. 787 (Louisiana code).

<sup>3</sup> *Jacob*, 193; *Stephens v. James*, 1 M. & K. 627; 7 Sim. 141. In some of the United States, the appointment of non-residents is prohibited by statute; but, as in administration other statutes may facilitate, as where one has a resident attorney answerable for process. 9 Mo. 227.

324. (3) As to the method of appointing a guardian, the usual practice in chancery is for the court, as soon as the petition is presented, to make an order for a reference to a master to approve of a proper person for the guardianship; and upon his report with scheme of maintenance, the appointment is made by the court and due recognizance entered into.<sup>1</sup> Our American practice in the appointment of probate guardians is usually more simple.<sup>2</sup>

Cf. *Berry v. Johnson*, 53 Me. 401. The person selected need not reside within the jurisdiction of the county court making the appointment. For appointment of non-resident guardians, see further, 8 Beav. 485; 21 E. L. & Eq. 524. A non-resident alien may be precluded. 3 Redf. (N. Y.) 259. Discretion usually rests in the court.

A certain appointment may be objectionable because of property interests adverse to those of the minor, and statutes sometimes interpose in this respect; as, for instance, in rendering ineligible the executor or administrator of an estate in which the minor is interested. 35 Ohio St. 550; *Kramer v. Mugell*, 153 Penn. St. 493. But cf. 17 R. I. 480 (ward sole residuary legatee). The nomination of some suitable third person as guardian by the party having a prior right carries weight. *Kahn v. Israelson*, 62 Tex. 221.

<sup>1</sup> § 307; *Macphers*. Inf. 106-109; 11 Jur. 114; 1 Ired. Eq. (N. C.) 256; 13 Jur. 800. And see 15 E. L. & Eq. 317.

<sup>2</sup> § 307. Petition is presented by the person desiring the appointment, whereupon a citation is issued, for all parties interested to appear on a certain court day. The judge, upon the day specified, after a summary hearing, appoints the guardian, and issues letters of guardianship upon filing bond with proper security. And see § 307, as to appeal.

For practice in particular States, see local statutes; § 307. Next of kin may appeal. 14 Mich. 249. And see 4 Redf. (N. Y.) 306. Some codes require the appointment made in open and regular court. 72 Ga. 125. Cf. 65 Iowa, 629. A minor entitled to his own choice, or fourteen years old, may appeal if that choice is not respected by the court. 38 Conn. 304; 85 Me. 360; 128 Mass. 592. Where appointment is made on the ground of estate, the ward being non-resident, statute requirements as to notice must be strictly pursued, or all subsequent proceedings may be rendered void. 3 Sawyer (U. S.), 353. But see 62 N. H. 252. Liberal discretion of lower court in a selection or deciding to appoint, favored in 115 N. Y. 669. In appointing a guardian over an adult insane person or spendthrift, notice to the intended ward himself is the main concern. 9 R. I. 204; 11 R. I. 187. See 64 Ga. 298. Assent or attendance in such proceedings dispenses with a formal notice so far as those interested are concerned. 83 Cal. 344.

325. (4) As to the effect of an appointment, the appointment of a chancery guardian is of itself an act exercised by the court of highest authority in such matters; and the appointment (except for appeal) cannot be impeached elsewhere, nor set aside by a common-law tribunal. The court which creates the guardian superintends his acts and removes him if necessary. Such is the nature of chancery jurisdiction wherever it exists.<sup>1</sup> But the effect of appointments made by probate authority is not the same. In general, the same principles apply as in grants of administration; probate jurisdiction being much the same, whether over the estates of deceased persons or of infants.<sup>2</sup>

<sup>1</sup> § 306; Macphers. Inf. 119.

<sup>2</sup> For fraud or excess of jurisdiction, letters of probate guardianship may be attacked collaterally; not otherwise. But a person sued in the common-law courts cannot defend on the ground that the guardian is unsuitable for his trust; the letters of guardianship sufficiently disprove it; they are the guardian's credentials of authority everywhere, and, if improperly issued, should be revoked or vacated by the court which issued them. The later and safer tendency, here, as in grants of administration, is to sustain the court's decree against indirect and collateral attacks. 11 Ala. 461; Kimball v. Fisk, 39 N. H. 110; Mathews v. Wade, 2 W. Va. 464; 4 Cal. 310; 82 N. Y. S. 986; 153 Penn. St. 493. As to the effect of defective notice in probate appointments, see § 306; 102 Mass. 14; 32 Md. 42; 22 Barb. 178; 26 Conn. 273; 19 Cal. 629. As to other informalities, see 29 Conn. 564; 22 Ind. 384. The letter of guardianship need not recite the mode and particulars of nomination, but is in the nature of a certificate or commission. King v. Bell, 36 Ohio St. 460; Burrows v. Bailey, 34 Mich. 64. See 48 Ala. 621, as to jurisdiction during civil war. And see 36 Ohio St. 460 (lapse of time). As to failure to require bond, see 140 Cal. 263. An oral appointment of guardian is not to be shown; but the records themselves, with recorded judicial action in confirmation of a recorded appointment should be respected elsewhere. 53 Ark. 37; Holden v. Curry, 85 Wis. 504.

The decree of the court appointing a guardian is *prima facie* evidence of the ward's disability; and is even held conclusive in the case of an insane person or spendthrift. 4 Mass. 147. But the *prima facie* evidence of infancy is generally simple, and turns upon a simple question of fact,—the date of birth. And while the recitals contained in letters of guardianship afford *prima facie* proof on this point, in all contests involving the guardian's authority, the presumption thus raised must be very slight where letters of guardianship are issued

326. The principles of the civil law, as later adopted in Holland, France, and Spain, with reference to the jurisdiction and method of appointing guardians, differ not greatly from ours.<sup>1</sup>

upon the mere allegation of infancy in the petition and without special proof. § 308.

One who has been appointed guardian and acted as such, cannot deny the jurisdiction of the court which appointed him in a collateral suit. *Thurston v. Holbrook's Estate*, 31 Vt. 354; 25 Ga. 696; *Fox v. Minor*, 32 Cal. 111; *State v. Lewis*, 73 N. C. 138. If he ascertains that his appointment was without jurisdiction, he should surrender his letters at once and cease to act. See *quasi* Guardian, *post*, c. 4. General appointment construed as an appointment with reference to certain property only, when otherwise it would not be valid. 29 Minn. 27. The court's appointment of a guardian does not relate back like that of an executor or administrator. *Holden v. Curry*, 85 Wis. 504; *Huntsman v. Fish*, 36 Minn. 148. *Qu.* as to a testamentary guardian. Nor do the *quasi* guardian's mistaken acts or representations estop the infant or his guardian duly appointed. *Sherman v. Wright*, 49 N. Y. 228; 78 Tex. 378.

<sup>1</sup> § 309; 3 Burge, Col. & For. Laws, 938-943. One feature, adopted in Louisiana, is that of nomination in such cases by a family council. 106 La. Ann. 276. As to a mere clerical error not vitiating the appointment, see 109 La. Ann. 310.



## CHAPTER III.

### TERMINATION OF THE GUARDIAN'S AUTHORITY.

**327.** Guardianship lasts until the end of the period for which it was instituted. But it may be sooner terminated by the death or marriage of the ward, or by the death, resignation, removal, or supersedure of the guardian himself; or, if the guardian be a female, by her marriage. These topics will be considered in order.<sup>1</sup>

**328.** The natural termination of guardianship, in the case of infants, is reached when the infant becomes of age, for he is then free and competent, under the law, to transact his own business and control his own person.<sup>2</sup> But the natural limitation of the guardian's authority may be even sooner, if derived from testamentary appointment; for the testator may designate a shorter period or some particular event which shall determine the relation.<sup>3</sup> No more precise limit can be assigned to the authority of guardians over insane persons

<sup>1</sup> § 310.

<sup>2</sup> § 311. No guardian of an infant, whether a socage, natural, testamentary, chancery, or probate guardian, can act in such capacity after the ward is twenty-one years old or has reached majority; but should present his account and settle with the late ward. 1 Bl. Com. 461, 462, Harg. n. Statutes relative to guardianship are sometimes explicit on this point. *Stroup v. State*, 70 Ind. 495. See *Tate v. Stevenson*, 55 Mich. 320; *People v. Seelye*, 146 Ill. 189.

<sup>3</sup> See *Holmes v. Field*, 12 Ill. 424; 1 Bradf. (N.Y.) 208. See also as to guardian in socage, for nurture, etc., § 311; *Macphers. Inf.* 41, 65; 1 Bl. Com. 461, 462, Harg. n.; 12 Ohio, 195. While the ward, on arriving at fourteen, may have the statute right to choose a new probate guardian, the general rule is that such guardian should be first designated, judicially approved and qualified before the former guardian can be considered as discharged from his trust. *Bryce v. Wynn*, 50 Ga. 332.

and spendthrifts, than that of the ward's necessities.<sup>1</sup> But a period so difficult to fix should be judicially determined, for which cause a formal discharge from guardianship is to be sought and obtained, and meantime the guardian's authority will continue.<sup>2</sup>

**329. Death of the ward necessarily terminates guardianship.** And after the ward's death the guardian's only duty is to settle up his accounts and pay the balance in his hands to the ward's personal representatives, whereupon his trust is completely fulfilled.<sup>3</sup>

**330. The lawful marriage of any ward, whether male or female, must necessarily affect the rights of the guardian.** So far as the ward's person is concerned, there can be no question that the guardianship ends; but as to the estate, the rule, in view of late married women's statutes, is not so clear.<sup>4</sup> The local statute is sometimes explicit enough to relieve one of doubt on the main question.<sup>5</sup>

**331. Guardianship is terminated by the death of the guardian.** But the ward does not thereby necessarily become free, for a

<sup>1</sup> When he becomes sufficiently restored to reason, or is otherwise fit to control his own person and estate, this guardianship ceases; for the purposes of the trust are felt no longer.

<sup>2</sup> 49 Me. 269; 1 Johns. Ch. (N. Y.) 600; 39 N. H. 110; 14 Mass. 222; 55 Mich. 320. The issue here is whether the ward has sufficiency of reason to manage his own estate. *Cochran v. Amsden*, 104 Ind. 282.

<sup>3</sup> § 312; *Sommers v. Boyd*, 48 Ohio St. 648. A guardian cannot sue on behalf of his ward after the latter's death, nor continue a suit already begun. *Richmond v. Adams Bank*, 152 Mass. 359.

<sup>4</sup> § 313. If, however, a male ward marries a female, whether she be minor or adult, his guardian retains power over his estate, as before, until he becomes of age. 2 P. Wms. 103; 3 Atk. 619; 10 Yerg. (Tenn.) 160. And see 28 Gratt. (Va.) 670. Cf. 62 Ga. 574. As to the marriage of wards, both minors, in view of our married women's legislation, see § 313.

<sup>5</sup> As to whether the marriage of a female ward terminates *ipso facto* the guardian's authority over her estate, see § 313; *Porch v. Fries*, 3 C. E. Green (N. J.), 204; *Bartlett v. Cowles*, 15 Gray (Mass.), 445; 1 Bush (Ky.), 533; 64 Ga. 614. Some local codes declare that when the female ward marries an adult the guardianship shall cease. 3 Woods, C. C. (U. S.) 724; 45 Ind. 27; *State v. Joest*, 46 Ind. 235. In Alabama the

successor in the trust continues to control him. The executor or administrator of the guardian, as such, has no authority, for guardianship is a personal trust and not transmissible; but he should close the accounts of the deceased guardian in court, and duly pass the balance over to the successor.<sup>1</sup>

**332.** Resignation of the guardian was not in strictness permitted at the common law.<sup>2</sup> It is now however frequently provided by statute that probate guardians and other trust officers may, in the discretion of the court, be allowed to resign. But in absence of such legislation it would appear that no such guardian can resign as a matter of right; nor can the probate court legally accept his resignation and appoint a successor.<sup>3</sup>

**333.** The chancery court may undoubtedly remove or supersede all guardians of its own appointment, and substitute others at discretion for proper cause.<sup>4</sup> So, too, probate tribu-

married ward may call her guardian to account. 48 Ala. 214. And see, as to intermarriage of guardian and his ward, 1 Ind. App. 441.

<sup>1</sup> § 314. This successor is the person next indicated in the will appointing testamentary guardians, or the survivor of joint guardians, or some one appointed in chancery or probate to fill the vacancy, as the case may be. 33 Ark. 658. And see 60 Ala. 107; 66 Ala. 283; 156 Penn. St. 297; 65 Cal. 228.

<sup>2</sup> § 315. For a discussion of this rule as early applied, and the practical assignment by the guardian or his supersedure in chancery, see § 315; Ambl. 146; 2 Johns. Ch. (N. Y.) 489.

<sup>3</sup> § 315. See 11 Ill. 624; 10 Vt. 427. There is something harsh and offensive in the removal of a guardian from office. Moreover, numerous unforeseen emergencies may arise, so as to render the continuance of the trust improper; as if the guardian should become a confirmed invalid, or make himself obnoxious, or display a want of prudence in managing not inconsistent with good intentions nor sufficiently gross to justify a court in removing him. He might be fully aware of the advantage of a change to all parties concerned, and might desire to be relieved, provided he could withdraw with honor, and without submitting to a humiliating investigation of petty and insufficient grounds of complaint. So, too, the guardian's convenience, apart from all other considerations, might lead him to withdraw. § 315. See 52 Ga. 660; 32 Minn. 466.

<sup>4</sup> § 316; *Cowls v. Cowls*, 3 Gilm. (Md.) 435. A testamentary guardian, in many States, may now be removed on the same grounds

nals are authorized in most if not all of the States to remove guardians of their own appointment on good and sufficient cause.<sup>1</sup> If a guardian does not behave to the satisfaction of the court of chancery, orders regulating his conduct are frequently made upon him; and if any such steps be taken as to induce suspicion that the infant will suffer by the conduct of the guardians, the court will interpose.<sup>2</sup>

which warrant the removal of a probate guardian. 2 Redf. (N. Y.) 198. But sound discretion should be used. *Sanderson v. Sanderson*, 79 N. C. 389.

<sup>1</sup> 15 Fla. 9; 25 N. J. Eq. 508; 9 R. I. 536; 65 Tex. 442 (defective petition). The removal of a guardian by a decree of the appellate probate tribunal terminates summarily the guardianship granted below, even though the case be sent back to the lower tribunal for further proceedings. 156 Mass. 277. And see 21 Vt. 503. And as two persons, or sets of persons, cannot at the same time hold the same trust, it follows that one guardian with due credentials must be removed, or a vacancy otherwise created, before the court can make a new appointment. 6 Yerg. (Tenn.) 458; 9 Watts (Penn.), 169; 8 Pick. (Mass.) 528; 23 Miss. 550; *Copp v. Copp*, 20 N. H. 284; 106 Ga. 753.

<sup>2</sup> 1 Ves. 160; 1 P. Wms. 705. This rule has now less force than formerly.

There can be no removal of a probate guardian without cause shown. 7 S. & M. (Miss.) 740. Courts of chancery are equally bound to observe this principle; but their discretion is absolute. Some of our codes make it imperative that a statutory ground exist for removing one guardian and appointing another. 2 Dem. (N. Y.) 439; 4 Dem. 153. And where a statute enumerates the grounds of removal, grounds not enumerated authorize no removal. 62 Tex. 221; 2 Dem. (N. Y.) 430. A mere stranger cannot apply to have a guardian removed; it must be a party in interest. 1 How. (Miss.) 295. Nor can one who has been properly removed, though the mother herself, claim any right of recommending a successor. 32 Miss. 205.

Among the causes which have been deemed sufficient for the removal of a guardian are these: Appointment to the trust without proper notice to other parties interested; gross and confirmed habits of intoxication; any breach of official duties amounting to misconduct; failure, after being ordered to do so, to file inventory or accounts as required by the terms of his trust, without justifying excuse; employing the ward or using the ward's funds for the guardian's own advantage, to the ward's detriment; failure to support the ward with income ample for doing so, especially if the guardian be the father; abandonment of the trust; criminal conviction; ignorance or imprudence on the part of the guardian, whereby the ward's interests suffer; waste of the ward's estate.

**334.** The court is allowed a liberal discretion over removals, as in making appointments, and its decision will not be reversed on appeal unless palpable injustice has been done.<sup>1</sup> But the guardian is entitled to notice before removal, that he may appear in defence; and, if removed without such notice, unless he has waived it by his voluntary appearance in court, he has good ground for appeal; and it is doubtful whether a new appointment under such circumstances has any validity whatever.<sup>2</sup>

§ 316; and cases cited. But as to insolvency alone, without fraud, see *ib.*; 73 Mo. App. 78. Intermeddling with the estate before qualification, if in good faith and upon due care, is insufficient. 18 Tex. 700. As to a guardian's adverse interest, see 108 Penn. St. 604. Guardians may in some States be removed wherever it will be for the ward's interest. There may be a combination of circumstances to justify the removal. "Improper conduct," in respect of the care of the property or of the ward's person, is sometimes the statute rule. Or such conduct as tends to alienate an infant ward's affections from the parent, who is a person of good character. Or a mere unsuitableness without misconduct of any kind. Different local codes will be found to prescribe varying rules in this respect, and to use differing language. § 316 and cases cited, which are based largely upon statute construction; 105 Mass. 501; 66 Cal. 240; 155 Mass. 433; 48 Ind. 203; 95 Ind. 307; 206 Penn. St. 64 (stirring up family hostility). Religious opinions were formerly made a test of the guardian's capacity to act. But such conflicts seldom arise at the present day. English cases sometimes present conflicts over religious influence; but rarely do those of America. See *Nicholson's Appeal*, 20 Penn. St. 50. Cf. 82 N. Y. S. 986; [1902] 1 Ch. 688; *McGrath, Re*, [1892] 2 Ch. 496.

Guardians must surrender their authority when they move out of the jurisdiction, or the court will take it from them. This rule is not uniform, however, in all the States, and the more reasonable rule (aside from statute direction) is to make them liable to displacement on such a ground whenever, as non-residents, they could not have been appointed in the first instance. 18 Ind. 159; *Cockrell v. Cockrell*, 36 Ala. 673; 11 Ala. 461; 29 La. Ann. 798. Where the practical effect of a guardian's non-residence is such as to raise any of the other statute causes already enumerated, a summary removal from office would be proper. § 317; 62 Miss. 38; 81 Ala. 445.

<sup>1</sup> *Nicholson's Appeal*, 20 Penn. St. 50; *Isaacs v. Taylor*, 3 Dana (Ky.), 600; 5 Ind. 513; 73 Mo. App. 78.

<sup>2</sup> 7 Yerg. (Tenn.) 143; *Myers v. Pearsoll*, 17 Ind. 405; 20 N. H. 284; *Croft v. Terrell*, 15 Ala. 652. But where the guardian cannot be found,

**335.** Testamentary guardians are not removed, but superseded in their functions in English practice.<sup>1</sup> This is still the doctrine of the English chancery; but it exercises full jurisdiction in ordering infants to be made wards of court, with suitable directions for their maintenance and education; and it will restrain the testamentary guardian from interference with the person and estate of wards thus taken under its protection.<sup>2</sup> In this country, however, the right of removal is exercised as in other cases.<sup>3</sup>

**336.** The marriage of a female guardian may terminate one's authority, though that of a male guardian never does.<sup>4</sup> What has already been said on the subject of appointing married

constructive notice, as by advertisement, may perhaps suffice. See 79 N. W. 176; 58 P. 137. An order of removal for embezzlement *ex parte* and without notice is void. *Colvin v. State*, 127 Ind. 403. As to a revocation of letters where the trust has never been fully assumed, or the appointment was illegal, less strictness is requisite. See *Scobey v. Gano*, 35 Ohio St. 550. Where the removal is sought on grounds imputing no wrong to the guardian, but rather the ward's paramount claims, notice is sometimes dispensed with; still the better opinion is in favor of notice in all cases. See *Hovey v. Harmon*, 49 Me. 269. The judge may exercise a liberal discretion in taking evidence for his own information. He may consider material facts bearing upon the issue at the date of the hearing, though not existing when the petition was filed. 155 Mass. 433.

<sup>1</sup> § 317 *a*. This is a refinement adopted, it is said, out of deference to the act of Parliament. *Macphers. Inf.* 128. See 2 Ch. Cas. 237; 1 Ves. 160; 1 Sch. & Lef. 106.

<sup>2</sup> *Smith v. Bate*, 2 Dick. 631; *Ingham v. Bickerdike*, 6 Madd. 275.

<sup>3</sup> § 317 *a*. And see *ante*, 332-334.

By the common law idiots, lunatics, etc., were passed over in the guardianship. *Co. Litt.* 88, 89; *Macphers. Inf.* 24, 25. There can be little doubt that the insanity of a probate or chancery guardian would at this day be good cause for his removal or supersedure; and a final settlement of his guardianship accounts would properly be required from his own guardian. § 317; *Modawell v. Holmes*, 40 Ala. 391; 2 Redf. (N. Y.) 198.

<sup>4</sup> § 318; 2 Redf. (N. Y.) 52; *Co. Litt.* 89 *a*. See 7 Vt. 372. Testamentary guardianship in England seems to be left to the operation of the will in such cases: chancery refusing to interfere with the testator's own directions. 9 Mod. 135; 4 Bro. P. C. 306. See *Corbet v. Tottenham*, 1 Ball & B. 59.

women guardians applies, likewise, in this connection.<sup>1</sup> Certainly, if marriage does not absolutely put an end to the guardian's authority, it has the common-law effect of joining her husband in the trust.<sup>2</sup>

337. There are other cases in which it is said that a new guardian may be appointed, as though guardianship had already determined.<sup>3</sup>

<sup>1</sup> *Ante*, 323; *Martin v. Foster*, 38 Ala. 688; *Elgin's Case*, 1 Tuck. (N. Y.) 97; 3 Bush (Ky.), 74.

<sup>2</sup> *Wood v. Stafford*, 50 Miss. 370; *ante*, 95. Statutes in some States change the old rule, and expressly authorize a married woman to be guardian. See *Hardin v. Helton*, 50 Ind. 319; *Cotton v. Wolf*, 14 Bush (Ky.), 238. And see 14 La. Ann. 112; 27 La. Ann. 232. See also as to such guardian's *bona fide* acts before removal, *Hood v. Perry*, 73 Ga. 319; 54 Ark. 480.

<sup>3</sup> § 337. As where a guardian — *e. g.* testamentary — renounces his appointment. 1 Dick. 350; *O'Keefe v. Casey*, 1 Sch. & Lef. 106; 1 Humph. (Tenn.) 210; 6 Md. 472; 15 Fla. 9. As to whether filing a bond, with proper security, is to be regarded as the condition precedent to a chancery or probate appointment, so that letters need not be revoked in such a case, see 8 Pick. 143, 528; 8 Gill & J. (Md.) 111. See *West v. Forsythe*, 34 Ind. 418; *Fant v. McGowan*, 57 Miss. 779. Letters of guardianship obtained through material false representations may be revoked. *Clement, Re*, 25 N. J. Eq. 508. See Co. Litt. 88 b; *Macpherson*. Inf. 25 (civil death). In the United States, local statutes largely regulate the general subject of terminating a guardian's authority.

## CHAPTER IV.

### NATURE OF THE GUARDIAN'S OFFICE.

338. The powers and duties of a guardian relate either to the person of the ward, or to the ward's estate, or to both person and estate.<sup>1</sup> While guardianship of the person resembles the relation of parent and child, it is not altogether like it. The parent must support his child from his own means; and in return the child's labor and services belong to him. But it is otherwise with the guardian as such.<sup>2</sup> Nor are guardians of the estate vested with an interest precisely like that of trustees; for while the latter may sue and be sued in their official capacity, suits by and against infants are brought in the name of the ward and not the guardian.<sup>3</sup> The guardian is not always

<sup>1</sup> § 330; 2 Kent, Com. 230-233. As guardian of the person, he is entitled to the custody of the ward; he is bound to maintain him in a style suitable to the latter's means and condition in life; if the ward be a minor, he superintends his education and directs him in the choice of a pursuit; and in general, he supplies the place of a judicious parent. As guardian of the estate, he manages the ward's property, both real and personal, with faithfulness and care, changes investments whenever necessary, with permission of the court, pays the just debts of the ward, collects his dues, puts out his money on interest, manages his investments, keeps regular accounts, and is, in effect, the ward's trustee. Whether the guardianship be in socage, testamentary, or by chancery or probate appointment, these powers and duties are essentially the same; although, as we have seen, socage guardianship was created with special reference to the ward's real estate. *Supra*, c. 1. Moreover, chancery and probate guardians are brought more closely under judicial control and supervision than either guardians in socage or testamentary guardians.

<sup>2</sup> He need only supply the ward's wants so far as the ward's own estates in his hands and the liberality of others may enable him; nor has he any personal right to the child's services or earnings. But see, as to *quasi* parents, *ante*, 236.

<sup>3</sup> See *infra*, Part V. c. 6. Guardians in socage were guardians of both person and estate. § 330. See Vaugh. 178, 185. Testamentary guardians too (subject to statute modifications) are guardians of both person



entitled to the custody of the infant's person; but chancery will exercise its discretion for the benefit of the latter.<sup>1</sup> And it is the policy of our legislation to leave the child's person in his parents' keeping so far as possible. But the guardian may be a "guardian of the person and estate" notwithstanding.<sup>2</sup>

**339.** Whether a guardian is a trustee is sometimes asked.<sup>3</sup> It is often difficult to say what in strictness is a trustee, since every trust is limited by the instrument which creates it. The powers of a guardian differ greatly from those of an executor or administrator. But so far as guardianship of the estate is concerned, a guardian appears in fact a trustee, and not a mere attorney; for he holds the legal estate for the benefit of another.<sup>4</sup>

**340.** Where there are two or more testamentary guardians, and one of them dies or is removed, the survivor or survivors

and estate. But chancery guardians are not always invested with such powers; for the court will make such orders as are needful in all cases; but where no suit is pending, and proceedings are commenced by petition, the guardian is appointed for both person and estate. Macphers. Inf. 105, 114; 2 Kent, Com. 229; 1 Bro. C. C. 556; 1 Madd. 213. Probate guardianship is subject, in great part, to local legislation; but it may safely be asserted, as a general principle, that all probate guardians are guardians of both person and estate, save so far as a natural guardian's rights over the person are reserved by express statute or otherwise, and that the court cannot commit guardianship of the person to one and guardianship of the property to another. See *Tenbrook v. M'Colm*, 7 Halst. (N. J.) 97. But some State codes permit a separation of the functions, with separate guardians accordingly. 84 Iowa, 362. And see 17 R. I. 760.

<sup>1</sup> Macphers. Inf. 119; 2 Ves. Sen. 374 (orders as to access or custody).

<sup>2</sup> § 330.

<sup>3</sup> On this point, see discussion § 321; 1 P. Wms. 703; 2 P. Wms. 102; *Gilbert v. Schwenck*, 14 M. & W. 488. As to chancery and probate guardianship in this respect, see 3 Johns. Cas. (N. Y.) 53; 6 Rand. (Va.) 556; 3 Dana (Ky.), 600; 8 Ala. 796; 10 Vt. 427; *Lincoln v. Alexander*, 52 Cal. 482; 1 Vt. 370 (spendthrift).

<sup>4</sup> See *Wall v. Stanwick*, 34 Ch. D. 765. But see *dictum* in 13 Pick. (Mass.) 206; *Muller v. Benner*, 69 Ill. 108; *Rollins v. Marsh*, 128 Mass. 116 (guardians of minor spendthrifts, or insane persons).

As the rights and duties of all modern guardians, probate guardians included, depend so greatly upon local statutes, local jurisdictions may be found to differ as to the nature of the guardian's office, which, after all, is *sui generis*.

shall continue.<sup>1</sup> Of two or more persons appointed joint guardians under a will, one may qualify without the other; and where one declines to act, all the rights and powers created by the appointment under the will may devolve upon the other.<sup>2</sup>

**341.** The court of chancery holds the ward's property closely within its grasp in English practice.<sup>3</sup> Probate guardianship in this country is quite different.<sup>4</sup>

<sup>1</sup> § 323. It is stated otherwise in England with joint guardians by chancery appointment; for if one dies, the office determines. But the survivors will be appointed without a reference, so that after all the rule is only formal. *Bradshaw v. Bradshaw*, 1 Russ. 528.

The American rule, reinforced by local statute, is rather as in co-executorship, for the survivor or survivors to continue the trust, whether for chancery or probate guardians. 3 Johns. Cas. (N. Y.) 53; 10 Vt. 427; *Hopk. (N. Y.)* 309; 2 Sim. 41.

<sup>2</sup> *Kevan v. Waller*, 11 Leigh (Va.), 414; 18 N. Y. Supr. 41. But one who has previously declined may be preferred for a new vacancy. 2 Jones & Lat. 222.

On the principle that guardians are trustees, it is held that joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases. 4 Pick. (Mass.) 283. Also that the receipt of one is the receipt of all. 1 Brock. (U. S.) 266. Also that one cannot act in defiance of the other. *Gilbert v. Schwenck*, 14 M. & W. 488. As to consent to a co-guardian's misapplication, see 11 S. & R. (Penn.) 66; 18 Penn. St. 175. The fact that one joint guardian is dead will not prevent the co-guardian's prior accounts from being opened on a final settlement in court. *Blake v. Pegram*, 101 Mass. 592. Guardians, like other trustees, may portion out the management of the property, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the other's acts can be shown. 8 Watts & S. (Penn.) 143. And the discharge of one who has received no part of the estate relieves him from liability. *Hocker v. Woods*, 33 Penn. St. 466. But as to presumptions, see 2 Dev. & Bat. Eq. (N. C.) 155.

<sup>3</sup> § 323; *Macphers. Inf.* 118, 213, 268; 2 Sch. & Lef. 26. All the money due the infant is got in and invested in the public funds. A receiver is, if necessary, appointed to facilitate collections, and generally the same person is made a permanent receiver of the ward's real estate, to collect all rents. Chancery, thus managing actively the ward's property, makes its own scheme for maintenance, and allows the guardian a certain fixed income accordingly.

<sup>4</sup> § 323. Schemes of maintenance are seldom heard of; nor are receivers

**342. Guardianship and other trusts are sometimes blended.**

Thus the same person is frequently executor under the parent's will and also guardian of the minor children. Hence the question will sometimes arise whether he holds the fund in the one or the other capacity.<sup>1</sup> A guardian cannot blend

appointed. The guardian usually collects his ward's dues, whether from the executor of the parent or others, and manages the property on his own responsibility, with little judicial interference. He regulates at discretion the sum proper for annual expenditure, and changes the rate when expedient. Of course he is held accountable, on legal principles, much the same as those of the English chancery; but he seldom applies to the court for directions, unless some perplexity arises, or it becomes expedient to sell real estate, or when the ward cannot be supported without breaking in upon the principal fund.

<sup>1</sup> In such a case the old rule is that he cannot be sued in both capacities; nor are both sets of sureties liable. § 324; 1 How. (Miss.) 365. He is in the first instance liable as executor; and in general, to render him liable as guardian, there should be some distinct act of transfer. His accounts rendered may show the transfer of the legacy or distributive share from his account as executor to his account as guardian; and thereby his liability as guardian will become fixed. 1 Brock. (U. S.) 266; 4 Harring. (Del.) 424; 16 Ill. 318; 6 Clarke (Iowa), 123; Scott's Case, 36 Vt. 297. Cf. 13 Met. (Mass.) 51. But where no clear evidence appears, thus or otherwise, of an actual transfer, presumptions are applied as well as facts in proof. 4 Gill & Johns. (Md.) 220; 6 Dana (Ky.), 3; Crosby v. Crosby, 1 S. C. n. s. 337; Wilson v. Wilson, 17 Ohio St. 150; Townsend v. Tallant, 33 Cal. 45; Wood, Re, 71 Mo. 623; Weaver v. Thornton, 63 Ga. 655. For slight facts in evidence, see 2 Hill, Ch. (S. C.) 277; 10 Lea (Tenn.), 367; Thurston v. Sinclair, 79 Va. 101; 4 Gill & Johns. (Md.) 220; 14 S. C. 511. Acts inconsistent with the purpose of holding as guardian, and consistent with that of continuing administrator or executor, should not readily be construed to a ward's prejudice; but rather serve in any event to aid the beneficiary who seeks redress. In doubtful cases of this kind, the modern inclination is to let the ward sue both sets of sureties, or either, leaving them to adjust their equities among themselves. Harris v. Harrison, 78 N. C. 202. And see 14 S. C. 511. So, too, where a guardian subsequently becomes trustee. 68 N. C. 554; Perry v. Carmichael, 95 Ill. 519; 52 S. W. 390.

As to the rule where a legacy is given under a will to an infant, see Gunther v. State, 31 Md. 21; 2 Dem. (N. Y.) 624. And see Low v. Hanson, 72 Me. 104 (government money); 82 Mo. 99. A guardian of the estate of minors may contest the account of an executor or administrator in an estate where his wards are interested. Rose's Estate, 66 Cal. 241.

distinct trusts of guardianship by appointment, nor blend the guardianship itself with a different trust.<sup>1</sup>

343. That appointment denominated at common law *durante minore etate* is applied to a designated guardian under age, in English practice.<sup>2</sup> But in this country, while there are statutes in some States favoring similar doctrines, in others the court has full discretion rather in selecting a substitute for the child.<sup>3</sup>

344. A quasi guardianship often arises at law where there has been no regular appointment, or an appointment without jurisdiction, or some intermeddling; or even where the minor's property is wrongfully purchased by one confidentially related to him.<sup>4</sup> The general principle thus recognized is that any person who takes possession of an infant's property takes it in trust for the infant. Hence courts of equity will always protect the helpless in such cases by holding the person who acts as guardian strictly accountable.<sup>5</sup> On the same principle one regularly appointed guardian of an infant is held respon-

<sup>1</sup> 6 Ind. 268 (guardian of minor and guardian of insane person). It was held that his trust properly expired with the infancy of the minor. An actual appointment, after the regular form, is essential to a guardian's authority. See *King v. Bell*, 36 Ohio St. 460. But the guardian of a minor has sufficient authority to act during the ward's minority, whether the ward be of sound or unsound mind. *Francklyn v. Sprague*, 121 U. S. 215.

<sup>2</sup> § 325; *John v. Bradbury*, L. R. 1 P. & D. 245; *Stephenson's Goods*, L. R. 1 P. & D. 287.

<sup>3</sup> § 325. Such administrator has for the time being all the powers of a general administrator, but his term of office is restricted to the infant's minority. *Schouler, Executors*, §§ 132, 135.

<sup>4</sup> See *Hindman v. O'Connor*, 54 Ark. 627.

<sup>5</sup> § 326. A father, or a step-parent or a widowed mother remarrying, has thus been held accountable; or one with a null or irregular appointment. See *Pennington v. Fowler*, 3 Halst. Ch. (N. J.) 343; *Alston v. Alston*, 34 Ala. 15; 15 E. L. & Eq. 579; 54 Ark. 627; *Wall v. Stanwick*, 34 Ch. D. 763; *Earle v. Crum*, 42 Miss. 165; *McClure v. Commonwealth*, 80 Penn. St. 167; 73 N. C. 138. Cf. 9 Port. (Ala.) 636; 2 Eng. (Ark.) 520. And see *Jacox v. Jacox*, 40 Mich. 473; *Munroe v. Phillips*, 64 Ga. 32; *Sherman v. Wright*, 49 N. Y. 227. Chancery has full jurisdiction over the transactions of all persons standing *in loco parentis*. 6 Gill (Md.), 269.

sible for acts committed before qualifying as such by giving bonds; or for acts after the ward attains majority, so long as his possession and control of the property continues.<sup>1</sup>

345. The guardian's authority is limited to the sovereign jurisdiction which appoints him, and does not extend to foreign countries, unless permitted by foreign laws. Every nation is sovereign within its own borders, but powerless beyond them. The rights of foreign guardians have been to some extent admitted, however, on the principle of comity.<sup>2</sup>

346. Questions sometimes arise in our courts as to the constitutional validity of certain statutes; while in Great Britain an act of Parliament is the supreme law.<sup>3</sup>

<sup>1</sup> 1 Sim. & Stu. 138; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608. Whether a woman's letters abate or not on her marriage, she is liable if she allows her husband to use the ward's property. *Hood v. Perry*, 73 Ga. 319.

<sup>2</sup> § 337. See Story, Conf. Laws, §§ 492-529; 41 Ch. D. 310.

Concerning such conflicts (1) as to the person of the ward, (2) as to the ward's estate; see §§ 338, 339 and various cases cited. In this country, the rights and powers of guardians over the ward's person are considered strictly local, even as between different States. § 338 and cases cited; 34 Ga. 253; 42 Mich. 528. But the paternal right would probably be recognized here as in England. See 4 Minn. 412. And cf. 4 Allen (Mass.), 321. As to the ward's property, however, a distinction has been made between movables and immovables. As to immovable property, or real estate, it is almost universally admitted that the law *rei sitæ* shall govern. § 339. As to movable or personal property, opinion has differed, but the present rule favors the idea that a guardian's rights are merely territorial. *Ib.* and cases cited. Hence, a sort of foreign or ancillary guardianship becomes sometimes suitable, as in administration. 8 Pa. Dist. 724.

<sup>3</sup> § 330; *Hoyt v. Sprague*, 103 U. S. 613. Such questions arise where a State legislature authorizes or confirms specially the guardian's sale of local land. *Ib.*; 7 Met. (Mass.) 644; 20 Wend. (N. Y.) 365; 2 Green Ch. (N. J.) 200. Doubtless the wiser policy of the legislature is to refer all cases of this kind to the courts under general laws; and thus do some State constitutions expressly require. *Brenham v. Davidson*, 51 Cal. 352. The sale is supposed to be authorized as of one in the guardian or trust capacity, and to require or to respect his due appointment. 50 Cal. 153; 52 Cal. 382. See, further, *Atkinson, Ex parte*, 40 Miss. 17.

## CHAPTER V.

### RIGHTS AND DUTIES OF GUARDIANS CONCERNING THE WARD'S PERSON.

**347.** As the guardian of a minor stands in the place of a parent, *sub modo*, his rights and duties, so far as concerns the person of his ward, are to be considered correspondingly with those of a parent. His rights relate chiefly to the ward's personal custody. His main duties are those of protection, education, and maintenance. These rights and duties will be considered at length in the present chapter.<sup>1</sup>

**348.** Guardianship, generally, carries with it a custody of the ward's person. This is especially true where the ward's parents are both dead or incompetent to act, for natural guardians have the prior claim to custody while alive. Some one must exercise the right of custody of the infant when the natural protector is wanting; and no one is more suitable than the officer invested by law with the responsibility of paying for the child's education and maintenance.<sup>2</sup> But the custody of infants, as we have seen, is a subject within the free discretion of courts of equity; and where the interests of the ward require it, the care of his or her person will be committed to others.<sup>3</sup>

<sup>1</sup> § 331.

<sup>2</sup> § 332. The guardian's title is, in this respect, higher than that of relatives and friends; and he may insist upon taking the child from the control of a stepmother or grandparent, or from any person to whom the natural parent had informally committed the care. *Coltman v. Hall*, 31 Me. 196; *Johns v. Emmert*, 62 Ind. 533. For such considerations, however material in determining the selection of a guardian, become superseded by the actual appointment. And it has been said that the decision of the court as to the guardian's appointment is a final decision as to the care and custody of the ward. *Senseman's Appeal*, 21 Penn. St. 331.

<sup>3</sup> § 332; 1 Ves. 160; *Macphers. Inf.* 119; *Ward v. Roper*, 7 Humph. (Tenn.) 111. The good of the child is superior to all other considera-

349. In custody the English cases are numerous where the mother's claim has been postponed to that of the testamentary or chancery guardian.<sup>1</sup> The American rule is not uniform in this respect; and as to testamentary and probate guardians, the widowed mother is in some States preferred to the guardian, while in others the guardian is preferred to the mother; the legislature frequently supplying the definite rule of guidance.<sup>2</sup> Chancery will grant access in certain cases while awarding the custody of the infant to other persons.<sup>3</sup> Proceedings on a writ of *habeas corpus* may specially determine the question of legal custody in cases of this kind. But a

tions. Of this the court will judge in each case by the circumstances, and make orders accordingly, both as to actual custody and as to the persons who may have access to the child. The infant's inclination shall have considerable weight, if he be of sufficient age; but not, it would appear, during the period of nurture. 2 Ves. Sen. 374; 40 E. L. & Eq. 109; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Garner v. Gordon*, 41 Ind. 92. See *ante*, 257-262, as to custody. Even a mother, free from misconduct who is appointed legal guardian of a daughter nearly sixteen years old cannot assume custody of the child where the latter's welfare opposes. *Reg. v. Gynghall*, [1893] 2 Q. B. 232.

American decisions have turned not merely upon chancery powers. They recognize the deeper principle of natural law, that the relation of parent and child shall not be roughly severed. § 332; 22 Barb. (N. Y.) 178. And thus we find probate guardianship in this country frequently limited by positive enactment, so as to reserve to the parents, or in other words to the natural guardians, the natural control of their own children and the right to educate, when alive and competent to transact business. 20 Wis. 507; *ante*, 246, 257. As to probate guardians, the more natural course, so far at least as strangers and distant relatives are concerned, is to bring up controversies of this kind in appointing, or in removing and making a new appointment. See *McDowell v. Bonner*, 62 Miss. 278; *Heather, Re*, 50 Mich. 261; *Burger v. Frakes*, 67 Iowa. 460. Cf. 158 Ind. 380.

<sup>1</sup> § 333; *Macphers. Inf.* 119-121; 5 Madd. 77; 2 P. Wms. 103; *Gillb. Eq.* 172; 11 Jur. 7; *Earl of Ilchester's Case*, 7 Ves. 380.

<sup>2</sup> Cf. *Lord v. Hough*, 37 Cal. 657; *Ramsay v. Ramsay*, 20 Wis. 507; *Macready v. Wilcox*, 33 Conn. 321; *Peacock v. Peacock*, 61 Me. 211. A testamentary guardian cannot be controlled by mere wishes as to custody, expressed in the will which appoints him. *Knott v. Cottee*, 2 Ph. 192; § 333.

<sup>3</sup> *Knott v. Cottee*, 2 Ph. 192; 9 Mod. 116 (mother's representatives); *Macphers. Inf.* 120, 121; 1 R. M. Charl. (Ga.) 119 (near relative); *Hill v. Hill*, 49 Md. 450 (divorce decrees).

child in the personal keeping of his guardian is in legal custody, nor can unlawful imprisonment or restraint be imputed from the guardian's refusal to surrender such child to the parent.<sup>1</sup> On the other hand, the court cannot entertain *habeas corpus* to restore to the guardian a child forcibly removed by the parent, unless the child is actually restrained of liberty.<sup>2</sup>

350. Whether the guardian may change the ward's domicile from one country or State to another has given rise to much discussion.<sup>3</sup> The great objection to a change of the infant's domicile is that the right of succession to personal property may be thereby affected; and, probably, if the change is made with fraudulent intent, to the ward's injury or the custodian's private advantage, it will not be sustained.<sup>4</sup> But the modern facilities of travel increase the disposition to allow the guardian a *bona fide* discretion in such a change. And it would be unwise for American courts to apply, as between States united under one general government, the same rigidly exclusive doctrines which foreign countries differing in religion, customs, and civil institutions, might see fit to adopt in their intercourse with one another.<sup>5</sup>

<sup>1</sup> 22 Barb. (N. Y.) 178; *Townsend v. Kendall*, 4 Minn. 412; *Andrews Re*, L. R. 8 Q. B. 153. The guardian's assent to a temporary custody does not conclude him. *Commonwealth v. Reed*, 55 Penn. St. 425.

<sup>2</sup> 6 How. (Miss.) 406. Besides the writ of *habeas corpus*, there is a remedy by petition to the court of chancery. § 333; *ante*, 260. Concerning statute procedure for custody, see 61 Me. 211. In proceedings at the present day, English and American, whether by one remedy or another, the inclination grows to make the welfare of the child paramount and to treat the award of custody as an equitable matter. [1893], 2 Q. B. 232; *People v. Watts*, 122 N. Y. 238; *Lally v. Fitz Henry*, 85 Iowa, 49.

<sup>3</sup> See *Pottinger v. Wightman*, 3 Mer. 67 (surviving parent as guardian permitted); 5 Pick. (Mass.) 20; 2 Kent, Com. 227, *n*.

<sup>4</sup> § 334. It has been doubted whether a guardian, as such, not being a parent, has the right to change his ward's domicile. 2 Watts & Serg. (Penn.) 568; 14 Phila. 298. But cf. 2 Kent, Com. 227, *n*. A guardian acting in good faith may change an infant's domicile for its benefit. *Lamar v. Micou*, 114 U. S. 218; 77 N. Y. S. 924; 4 Bradf. (N. Y.) 221 (especially as concerns different counties in the same State).

<sup>5</sup> § 334. Where clearly disadvantageous to the ward and the ward's kindred and connections, this right is not favored. *Daniel v. Hill*, 52 Ala.



351. The guardian has not the same right as a father to the personal services of the infant, where he does not undertake to stand *in loco parentis*,<sup>1</sup> which he sometimes does.<sup>2</sup> The guardian has no personal right of action like a parent to recover for loss of services of the child.<sup>3</sup> But as the guardian is bound to promote the moral welfare of the person intrusted to his care, his authority corresponds; thus, he may warn off from the ward's premises any persons improper for him to associate with, and, if necessary, expel them forcibly.<sup>4</sup> And in many

430; *Wynn v. Bryce*, 59 Ga. 529. And the guardian's intention to change the ward's domicile, especially in the case of a very young child, is not to be presumed. *Marheineke v. Grothaus*, 72 Mo. 204 (a disadvantageous change). See further 92 Ala. 55 (a mere custodian).

In a new State jurisdiction of residence new letters are readily procured. 146 Penn. St. 585.

The English chancery court reluctantly permits its wards to be carried out of the national jurisdiction. 10 Ves. 52. See *Dawson v. Jay*, 27 E. L. & Eq. 451. But cf. as to permission thus granted under stipulation to return, etc., 1 M. & K. 627; 7 Sim. 141; 2 M. & C. 31 (objection of foreign influences upon an English child); 2 Hill Eq. (S. C.) 71.

<sup>1</sup> *Ante*, 286.

<sup>2</sup> § 335. For as his duty to educate and maintain is limited by law to the ward's resources, and is not, like the responsibility of a parent, absolute, so his rights are those of a representative, who should seek to add to the trust fund in his hands, and not his own private emolument. 4 Port. (Ala.) 390; 44 Vt. 624; *Haskell v. Jewell*, 59 Vt. 91. A guardian commits no breach of duty towards his ward who is nearly of age, in permitting the ward to devote all his wages towards keeping together and supporting his orphan brothers and sisters. *Shurtleff v. Rile*, 140 Mass. 213. Otherwise, if the guardian allowed such wages to be devoted to vicious and improper uses. *Ib.*

<sup>3</sup> 119 Ind. 111; *ante*, 273-276. Reimbursement of the ward's estate for medical attendance is a proper item of damage. As to the old English "writ of ravishment," and the statute enlargement of suits by the guardian for his ward's benefit, see § 336; 3 W. & S. (Penn.) 416; 119 Ind. 111. And as to damages for acts of the ward, binding as apprentice, etc., see § 336; 2 Rawle (Penn.), 269.

<sup>4</sup> § 335; *Wood v. Gale*, 10 N. H. 247. Insane persons and spend-thrifts cannot manifestly be subjected to the same personal restraint and custody as infants. But see *State v. Hyde*, 29 Conn. 564. This right is to be reasonably construed; and in the use of means and the amount of force necessary to effect his object, he is allowed a liberal discretion, such as a parent might exercise under like circumstances.

other respects the rights of a guardian resemble closely those of a parent *pro tanto*.

352. The guardian's duties as to the ward's person are those of protection, education, and maintenance. In exercising them, he is bound to regard the ward's best interests.<sup>1</sup>

353. Yet while the father is bound to educate and maintain his minor children absolutely and from his own means (with a right to their services as an offset), no such pecuniary responsibility, we are to remember, is imposed upon a guardian who is not the parent or does not undertake to stand in place of one. The latter, by virtue merely of such trust, need only use for that purpose the ward's fortune.<sup>2</sup> On the other hand, the

<sup>1</sup> § 336. Even though the ward be penniless, we are not to suppose that one vested with the full right of custody can neglect with impunity those offices of tenderness which common charity as well as parental affection suggest. For to the orphan he stands in some sense in the place of a parent, and supplies that watchfulness, care, and discipline which are essential to the young in the formation of their habits.

<sup>2</sup> § 337. In supplying the wants of his wards, he is to consider, not the style of life to which they have been accustomed, so much as their estate at his disposal. Whatever their social rank may have been, he may, provided they be left destitute, place them at work, or, if they are too young or feeble, surrender them to some charitable institution; they should, if old enough and able, be kept at work earning their support. An agreement may thus be made between the guardian and some relative of the child or a stranger, for the fair support of the ward in exchange for his services. He should, however, act with delicacy and prudence; he may properly consider in this connection the habits and tastes of the children and the wishes of their relatives; and he can relieve himself of responsibility by asking judicial guidance. The courts show a liberal disposition to protect the guardian from personal liability on account of his ward. And if a guardian has permitted the ward, at his own cost, to remain in the care and custody of another, without express contract as to the period of time, he may, whenever he pleases, terminate his own personal liability by giving notice; nor does it affect the case that his ward is then too sick to be removed. 4 Allen (Mass.), 326; 19 Ark. 623; 2 Watts (Penn.), 95; 25 Tex. 101; 18 La. Ann. 571; Brown v. Yaryan, 74 Ind. 305. See as to charge for the support of the ward, Pratt v. Baker, 56 Vt. 70; Moyer v. Fletcher, 56 Mich. 508. And see Latham v. Myers, 57 Iowa, 519; 82 Ind. 550; 73 Mich. 220; 91 Ind. 406; Conant v. Souther, 80 Wis. 656.

Some State codes require that the guardian of a minor who has a father or mother shall not expend anything for the ward's support with-

guardian may make himself liable for his ward whenever he chooses to do so, and makes that choice manifest, like any one else *in loco parentis*.<sup>1</sup> For necessities of his ward, supplied by the guardian's order and on his credit, the guardian then is liable; and this on the principle to be noticed hereafter, that the guardian has made a contract.<sup>2</sup> On the ward's own contract for necessities, the guardian is not personally liable.<sup>3</sup>

**354-356.** No guardian can expend more than the income of his ward's estate without proper judicial sanction. This is the settled rule in chancery, and it is universally applicable in

out a precedent order of court. 61 Miss. 148. And see 77 Va. 163. 6 Dem. (N. Y.) Sur. 39. But if the income of the ward's estate be ample for payment of the necessities supplied him, the creditors may, by a proper course of procedure, have it subjected to the satisfaction of their just claims. And this too, it would appear, notwithstanding any personal undertaking on the guardian's part. *Barnum v. Frost*, 17 Gratt. (Va.) 398; *Walker v. Browne*, 3 Bush (Ky.), 686; *Welch v. Burris*, 29 Iowa, 186; *Brown's Appeal*, 112 Penn. St. 18. Suit on the probate bond by permission of court is the common remedy in many States. 8 Cush. (Mass.) 587.

<sup>1</sup> § 337. If a guardian contracts for such support, he may become personally bound by his failure to limit the right for indemnity to the estate in his hands. *Lewis v. Edwards*, 44 Md. 333; 19 Vt. 437. And whenever he takes the ward into his own household as a boarder, the value of the child's services received must be computed as against any charge of the guardian for care and maintenance. *Otis v. Hall*, 117 N. Y. 131; *Marquess v. Le Baw*, 82 Ind. 550; *Starling v. Balkum*, 47 Ala. 314.

<sup>2</sup> A guardian, it is true, cannot bind his infant ward, or the latter's estate, by a contract, even for necessities. *Reading v. Wilson*, 38 N. J. Eq. 446. But he is entitled to a proper reimbursement for the necessities thus supplied by himself from the ward's estate. *Smith's Appeal*, 80 Penn. St. 397; *Rollins v. Marsh*, 128 Mass. 116; *infra*, c. 6.

<sup>3</sup> 1 Bailey (S. C.), 344; 27 Ga. 172; 13 Mass. 237. His own express contract needful to bind the guardian. 54 W. Va. 119. Yet the ward's contract may be ratified by the words or acts of a guardian. As a rule the guardian, if custodian of the ward's person, has the same right to judge as to what are necessities, according to the estate and social position of his ward, that a parent would have for his own child; and others who supply the minor are bound to take heed accordingly. 11 Ga. 607; 13 Rich. (S. C.) 163; *McKanna v. Merry*, 61 Ill. 177. The ward is not to be judge of his own necessities; it is the guardian rather, or the court. 52 Hun (N. Y.), 119. See further, 2 Allen (Mass.), 206; 48 Me. 279; 12 Ired. (N. C.) 67; 29 Ga. 82; *Hutchinson v. Hutchinson*, 19 Vt. 437.

the United States.<sup>1</sup> And a similar principle prevails under the civil law.<sup>2</sup> But to what extent the guardian renders himself personally liable, by exceeding the income without previous sanction of the court, is not quite clear.<sup>3</sup> In some cases it becomes both reasonable and necessary to exceed the ward's income, and the judicial sanction is granted accordingly, usually under some emergency.<sup>4</sup>

**357.** As the father is bound to support his own minor children, he cannot, when guardian, claim the right to use the income of their property for that purpose; much less to disturb the principal. But, as we have seen, a father is allowed, when his means are small, to claim assistance from their fortunes, to bring them up in becoming style. And where the father, when acting as guardian for his own children, might

<sup>1</sup> 4 Johns. Ch. (N. Y.) 100; *Myers v. Wade*, 6 Rand. (Va.) 444; 2 J. J. Marsh. (Ky.) 403; 3 Head (Tenn.), 87; 3 Dem. (N. Y.) 140; 72 Ga. 557.

<sup>2</sup> 14 La. Ann. 760; 86 La. Ann. 312.

<sup>3</sup> § 338. In most of the United States the guardian is justified in breaking the principal fund, under strong or sudden circumstances of necessity, for the benefit of his ward, and he may leave his conduct to the subsequent approval of the court when he presents his accounts. In cases of risk and uncertainty, however, the proper course is to obtain a previous order. Story, Eq. Juris. § 1355. Some State codes lay down a strict rule concerning the previous sanction of the court to exceeding the ward's income. 60 Miss. 277; 63 Miss. 143; 91 Miss. 270; *Jones v. Parker*, 67 Tex. 76. But, in other States ratification by the court is equivalent to a previous authority. 113 Penn. St. 46; *Ward Re*, 73 Mich. 220; 34 S. C. 496. The order in which the ward's property should be expended for his support and education is as follows: (1) the income of the property; (2) if that proves insufficient, the principal of personal property; (3) if both are inadequate, the ward's real estate, or so much of it as may be necessary. The ward's real estate can never be sold, except under a previous order of court. 8 Allen (Mass.), 125; 83 Gratt. (Va.) 663; 55 Ala. 493; § 338.

<sup>4</sup> 2 McC. Ch. (S. C.) 43; 9 E. L. & Eq. 219; 3 Baxt. (Tenn.) 314; 4 Dem. (N. Y.) 304; *Campbell v. Golden*, 79 Ky. 544; 10 Lea (Tenn.), 268. And see 3 Moll. 87; 4 B. Monr. (Ky.) 313 (income of a year anticipated); 2 Ired. Eq. (N. C.) 354 (increase or accumulations); 56 Ind. 542; 24 Miss. 204; 55 Ga. 89. See also *Chubb v. Bradley*, 58 Mich. 268; § 338.

have reimbursed himself, any other person, as guardian, may help him; rather, however, for the future than for the past.<sup>1</sup>

358. Courts of chancery will issue orders as to the ward's education;<sup>2</sup> and this rule applies to education secular or religious.<sup>3</sup>

<sup>1</sup> § 339 and cases cited; *McGeary v. McGeary*, 181 Mass. 539; *Macphers. Inf.* 219; 41 Ala. 234; 29 Iowa, 186. See *ante*, 249-251. If the guardian, or the person with whose claim he charges himself, was of adequate means, and bound legally to maintain the child as parent, or fully undertook to supply the place of parent, education and support cannot generally be allowed from the ward's estate. *Bradford v. Bodfish*, 39 Iowa, 681; *Snover v. Prall*, 38 N. J. Eq. 207; 94 Penn. St. 62; *Folger v. Heidel*, 60 Mo. 284 (past maintenance). Yet future maintenance is chargeable where the ward's means were disproportionate to the parent's and needful to provide in suitable style; and even past maintenance may be thus allowed. *Supra*, Part III. c. 2. The circumstances may always be considered and the proportionate means as between the ward and the person fulfilling the parental functions. 4 Redf. (N. Y.) 360. And see *Corcoran v. Allen*, 11 R. I. 567.

The allowance of money for the maintenance and education of infants constitutes an important branch of the English as contrasted with our American chancery jurisprudence. Generally speaking, whenever application is made for the appointment of a chancery guardian, maintenance is also applied for; and the guardian receives no more than the annual sum fixed by the court. § 339; *Macphers. Inf.* 106. Chancery will control the discretion of trustees as to allowance. *Hodges In re*, L. R. 7 Ch. D. 754. See also 51 Miss. 585. But as to personal estate, the American rule is, usually, that if the court would have authorized the expenditure upon application before it was made, the expenditure will be sanctioned upon settlement of the guardian's accounts. 33 Gratt. (Va.) 663; 40 Or. 353. Testamentary guardians or trustees may have special authority given under the will, which must be respected. *Capps v. Hickman*, 97 Ill. 429; *Breed's Will*, 1 Ch. D. 226.

<sup>2</sup> § 340; 3 Atk. 721.

<sup>3</sup> See as to religious education, L. R. 8 Ch. 622; L. R. 1 Ch. 263; 21 Ch. D. 817; 28 Ch. D. 82; *Violet Nevin Re*, [1891] 2 Ch. 299; 2 Ch. 496; *Scanlan Re*, 40 Ch. D. 200; 82 N. Y. S. 986 (children brought up after the religion of both parents). And see *supra*, Part III. c. 2, where the general subject of a child's education and maintenance is discussed.

## CHAPTER VI.

### RIGHTS AND DUTIES OF THE GUARDIAN AS TO THE WARD'S ESTATE.

**359.** In this country guardians almost invariably assume the full management of their wards' fortunes, unless restrained by the will of the testator; and whenever they do so they are bound by the principles which regulate the general conduct of all trustees and bailees. Ordinary prudence, care, and diligence should be therefore the correct standard as applied here wherever the trust is not purely gratuitous.<sup>1</sup>

<sup>1</sup> § 341. Two observations are to be made at the outset. (1) Unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; while, on the other hand, for unauthorized acts by which the ward's estate suffers, the guardian must pay the penalty of his imprudence. 18 Ves. Jr. 259; 1 Hill, Ch. (S. C.) 405. (2) The guardian's trust is one of obligation and duty, and not of speculation and profit. 2 Kent, Com. 229. Among the most obvious powers and duties of the guardian in the management of his ward's property are these: To collect all dues and give receipts for the same. To procure such legacies and distributive shares from testators or others as may have accrued. To take and hold all property settled upon the ward by way of gift or purchase, unless some trustee is interposed. To collect dividends and interest, and the income of personal property in general. To receive and receipt for the rents and profits of real estate. To receive moneys due the ward on bond and mortgage. To pay the necessary expenses of the ward's personal protection, education, and support. To deposit properly and invest and reinvest all balances in his hands. To sell the capital of the ward's property, change the character of investments when needful, convert real into personal and personal into real estate, in a suitable exigency; but not without judicial direction. To account to the ward or his legal representatives at the expiration of his trust. And, in general, especially if recompensed, to exercise the same prudence and foresight which a good business man would use in the management of his own fortunes, though under more guarded restraints. § 342; 10 Johns.

360. The guardian's right to sue or defend is incidental to managing his ward's estate; good discretion being exercised, and competent legal advice procured, if need be.<sup>1</sup> A guar-

(N. Y.) 435; 4 Watts (Penn.), 84; 2 Md. Ch. 111; 4 Rich. Eq. (S. C.) 14; Chapman v. Tibbits, 33 N. Y. 289; Johnson v. Blair, 126 Penn. St. 426.

<sup>1</sup> § 343; 8 N. H. 15; 9 Ind. 260; Southwestern R. v. Chapman, 46 Ga. 557; 16 Mass. 348 (for property wrongfully obtained before guardian's appointment). The guardian must sue in general in the name of his ward (except under qualifications to be noticed), and not in his own name. 9 Gratt. (Va.) 273; Vincent v. Starks, 45 Wis. 458. And if he institutes groundless and speculative suits, and is unsuccessful, or occasions a controversy over his accounts through his own fault, he must bear the loss; so, too, whenever his conduct shows fraud or heedless imprudence. Savage v. Dickson, 16 Ala. 257; Blake v. Pegram, 109 Mass. 541; Spelman v. Terry, 74 N. Y. 448. Otherwise, he is entitled to his costs and legal expenses out of the ward's estate. Flinn *Re*, 31 N. J. Eq. 640. An action in general concerning the estate of a minor must be brought by or against the minor, who is represented by his guardian. § 343 and cases cited. There is some discrepancy in the decisions, due largely to local statute. See Taylor v. Kilgore, 33 Ala. 214; 1 Foster (N. H.), 204. An action upon an express contract made by a guardian for his ward's benefit may be brought by or against the guardian personally. 10 Ind. 397; McKinney v. Jones, 55 Wis. 39; 56 Barb. (N. Y.) 197; Hightower v. Maull, 50 Ala. 495 (note payable to guardian or given by him); 12 Heisk. (Tenn.) 658.

When sued upon his own contract touching his ward's estate, judgment should be against the guardian personally. 1 Cart. (Ind.) 243; 10 Ind. 397. Where the judgment is to bind the ward's property, suit should be against the ward. Otherwise the property of the guardian must be levied upon, who will look to the infant's estate for his own reimbursement. 2 Strobb. (S. C.) 3; 1 Smith (Ind.), 150. And see Raymond v. Sawyer, 37 Me. 406; 68 Iowa, 122. Judgment against a person as "guardian" is a judgment against him personally, the additional words being descriptive merely. No action lies against a guardian upon the ward's contracts or debts; but suit should be against the ward, who may defend by guardian. 128 Mass. 116; 4 Mass. 439; Willard v. Fairbanks, 8 R. I. 1. In dower and partition proceedings a guardian may appear for the ward, like any guardian *ad litem*, in some States. 21 Ohio St. 651; 7 Cold. (Tenn.) 284; 98 Ind. 226; 85 Mo. 456.

In various instances the guardian may appear and make defence for the ward. In defending, as in bringing suits, and incurring costs and counsel fees, the rule is that the guardian should not wilfully or recklessly litigate over his ward's interests, but should apply ordinary pru-

dian is now generally permitted to submit to a fair arbitration questions and controversies respecting the property and interests of his ward, and the award made in pursuance thereof is binding on all parties. So he may compromise when acting in good faith and with sound discretion for the benefit of his ward.<sup>1</sup>

**361. A guardian cannot by his general contracts bind the person or estate of his ward, nor affect his ward injuriously.<sup>2</sup>**

dence and discretion in considering the probable benefits of such a course. *Kingsbury v. Powers*, 131 Ill. 182; 118 N. C. 103.

<sup>1</sup> § 343; 11 Me. 326; 12 Conn. 376; 14 S. & M. (Tenn.) 118; 18 Ala. 168. Local statutes are found in aid of this right. But on general principle the guardian's compromise and allowance of a baseless and unjust claim would not be upheld in equity as against the ward. 4 Dana (Ky.), 309. Nor would any arbitration which did not properly guard the ward's interests. 82 Ga. 687. An infant cannot, in any event, be bound by the fraudulent compromise of his guardian; though he would be commonly by a compromise made in good faith, apparently at the time in the ward's interest, and with reasonable prudence. *Lunday v. Thomas*, 26 Ga. 537; *Ordinary v. Dean*, 44 N. J. 64. Compromise or release under the sanction of the court having jurisdiction of the guardianship is allowed under some codes. 69 Iowa, 434; 14 R. I. 192. A guardian cannot release the ward's rights in real estate, irrespective of statutory power. *Pond v. Hopkins*, 154 Mass. 38; *Fowler v. Lewis*, 36 W. Va. 112. On the same general principles, and with like limitations, the guardian may release a debt due his ward, or a cause of action for damages. 3 P. Wms. 381; *Torry v. Black*, 58 N. Y. 158; 17 Col. 481. And in considering what is beneficial and binding as to a minor ward, the usual analogies applicable to infants have considerable application. § 343.

<sup>2</sup> § 344; 1 Pick. (Mass.) 317; 14 N. H. 343; 2 Rand. (Va.) 409. The insertion of words showing representative capacity imports that the contract was made as a guardian; the form of the remedy is affected, but not the primary source of liability in the real beneficiary. And on all such contracts, fairly made, the guardian is entitled to reimbursement from his ward's estate; while the other contracting party may presume a sufficiency of assets. In other words, the guardian's duty is to bring up the ward suitably; and if in the performance of his duty it becomes necessary for him to enter into contracts, they impose no duty on the ward, but bind himself personally and alone. Guardians, therefore, are personally bound on their contracts, in dealing with others on the ward's behalf, while in turn they get a recompense from the estate by charging their expenses to the ward's account, to be passed upon by the court; in which sense of a reimbursement alone, whether in law or equity, can it be said that the



362. The title to promissory notes made payable to the guardian is *prima facie* in him; and hence he may maintain suit, unless the defendant can show that it has been transferred to the successor, or otherwise disprove title.<sup>1</sup> The promise of a guardian to pay his ward's debts is not collateral, within the statute of frauds; and therefore it need not be expressed in writing.<sup>2</sup>

363. A guardian may employ attorneys-at-law or other agents, under suitable circumstances, and charge their compensation in his accounts.<sup>3</sup>

364. Conversions — or changes made in the character of trust property, from personal into real, or real into personal estate — are never favored, especially where the natural consequence would be to vary rights of inheritance.<sup>4</sup> The same may be said, with less force, of exchanges of the ward's property. Courts are reluctant to disturb the property of those who are only temporarily disabled from assuming full control.<sup>5</sup>

ward is liable, since the guardian can put no contract obligations upon his ward. 6 Mass. 58; 5 Ala. 42; *Rollins v. Marsh*, 128 Mass. 166; 80 Ill. 371; *Kingsbury v. Powers*, 131 Ill. 182 (promise to pay); 132 Mass. 414 (termination of liability). But as to contracts expressly limiting liability to assets, cf. 80 Ill. 371; *Rollins v. Marsh*, 128 Mass. 116; 38 N. J. Eq. 446.

<sup>1</sup> *Chambles v. Vick*, 34 Miss. 109; *Fountain v. Anderson*, 33 Ga. 372; *King v. Seals*, 45 Ala. 415; *Gard v. Neff*, 39 Ohio St. 607. And see 77 Iowa, 235; 29 Vt. 98; *State v. Greensdale*, 106 Ind. 364. So as to assigning the security and transferring note. *Brewster v. Seeger*, 173 Mass. 281. If the guardian settles with his ward whatever was due on a note taken by him, he may enforce payment for his own benefit. *Wright v. Robinson*, 94 Ala. 479.

<sup>2</sup> *Roche v. Chaplin*, 1 Bailey (S. C.) 419. See 6 Vt. 54; 47 Ala. 329.

<sup>3</sup> *Flinn Re*, 31 N. J. Eq. 640; *ante*, 360; *Taylor v. Bemiss*, 110 U. S. 42; 76 N. Y. S. 315. An employed attorney must look to the guardian for his compensation. 5 Dem. (N. Y.) 56.

<sup>4</sup> The previous sanction of chancery should always be sought; and this is only given under strong circumstances of propriety. As a rule the guardian may not convert his ward's personal estate into real estate without the previous sanction of chancery, nor may the vendor enforce a lien. § 347; *Boisseau v. Boisseau*, 79 Va. 73 (conversion from personal into real).

<sup>5</sup> Sales and exchanges of personal estate are very common, and the

**365. Acts done by a guardian without authority will generally be protected and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his peril.<sup>1</sup> This risk is restricted, however, to unauthorized as well as prejudicial acts; for no guardian can be an infallible judge of what is beneficial to his ward; and to make him liable in ordinary cases, beyond the limits of good faith and a sound discretion, would be intolerable.<sup>2</sup> It is to be observed,**

guardian may sell personal estate for the purposes of the trust without a previous order of court, provided he acts fairly and with good judgment; though his safer course is to obtain permission. But sales of the real estate of the ward would be extremely perilous, if not absolutely void, unless previous lawful authority had been obtained. Undoubtedly, they could not bind the ward under such circumstances; nor is the guardian permitted to sell first and obtain judicial sanction afterwards; nor to contract to sell at his own instance. 69 Barb. (N. Y.) 271; next chapter. So the guardian must not buy land with the infant's money without the direction of chancery; and having obtained permission to do so, he is bound to exercise good faith and seek his ward's best interests. § 347 and cases cited; 56 N. Y. S. 1105; 19 Ves. 122; 32 Ga. 266; Holbrook v. Brooks, 33 Conn. 347; 11 Penn. St. 36; Woods v. Boots, 60 Mo. 546; 3 Yerg. (Tenn.) 336; 9 Cal. 591; Davis's Appeal, 60 Penn. St. 118.

But a practical conversion takes place where the guardian uses the trust money in paying off the ward's mortgage debts; or redeems his ward's estate from foreclosure. 1 Vern. 428; 2 P. Wms. 278; 19 Pick. (Mass.) 346; 12 Mich. 356. See Sheahan v. Wayne, 42 Mich. 69; next chapter; 61 Mo. 142. Concerning the court's order as to sale or purchase, see 1 Rawle (Penn.), 266; 4 Allen (Mass.), 426. And see further, 38 Penn. St. 322; 2 Lans. (N. Y.) 422; 58 Tenn. 161.

<sup>1</sup> The transaction will perhaps avail as between the guardian and third parties; but the infant, on arriving at majority, may usually disaffirm it altogether, if not manifestly beneficial in the court's opinion, and require the guardian to place him *in statu quo*. §§ 348, 385.

<sup>2</sup> Hence, as judicial control becomes relaxed, the guardian's unauthorized acts lessen in number and importance, save so far as local statutes prescribe the rule. Where the guardian acts under judicial sanction, what he does in good faith receives strong protection. McElheny v. Musick, 63 Ill. 329. And even without previous judicial sanction he may do many acts beneficial to his ward in their scope or subject to the court's final approval. Maclay v. Equitable Co., 152 U. S. 499; Albert's Appeal, 128 Penn. St. 613; 144 Penn. St. 293. The guardian is bound for ordinary diligence if compensated, and for slight diligence at all events, on the usual footing of a bailee of property.

however, that chancery not only punishes corruption, but treats with suspicion all acts and circumstances evincing a disposition on the guardian's part to derive undue or selfish advantage from his position.<sup>1</sup> So far as the guardian acts within the scope of his powers he is bound only to the observance of fidelity and the diligence or prudence already indicated. And in absence of misconduct, his acts are liberally regarded like those of any trustee.<sup>2</sup>

<sup>1</sup> A trust should be managed exclusively in the interest of the *cestui que trust*; or, in case of guardianship, for the ward's benefit. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the ward's estate. § 348; 8 Barb. (N. Y.) 48; 22 Barb. 168; 11 B. Monr. (Ky.) 102; 1 Foster (N. H.), 9; *Heard v. Daniel*, 26 Miss. 451; 5 Ind. 257; *infra*, c. 9. He cannot be permitted to place himself in an attitude of hostility to his ward, or derive any benefit from the latter's loss. 10 Humph. (Tenn.) 275; 81 Tex. 104. Whenever he abuses the confidence reposed in him, he will be held to a strict accountability. He cannot make a collusive sale or improve the property for his own benefit. *Lane v. Taylor*, 40 Ind. 495; 15 N. Y. Supr. 205; 3 Woods (U. S.), C. C. 724 (incumbrance removed). Where the guardian purchases for himself at sales of his ward's property, his conduct will be closely scrutinized. See 61 Miss. 766; 38 Mo. 435; *Hudson v. Helmes*, 23 Ala. 585; *Chorpenning's Appeal*, 32 Penn. St. 315; 22 Barb. (N. Y.) 168.

The guardian must not mingle his own funds with those of his ward. 5 Shep. (Me.) 222. Where there are several wards, he must allot to each his due share of expenses and profits, as well as of principal. § 348; 17 S. & R. (Penn.) 144.

<sup>2</sup> He is not liable for investments carefully made, which afterwards prove worthless; nor where he deals with failing debtors prudently under all the circumstances, though good security be not available and a loss finally occurs. *Barney v. Parsons*, 54 Vt. 623; 88 N. C. 164; *Lamar v. Micou*, 112 U. S. 452; *Grammel Re*, 120 Mich. 487. Nor is he responsible for funds of which he was robbed without his fault. 1 Caines (N. Y.), 96; *Atkinson v. Whitehead*, 66 N. C. 296. But for any fraudulent transaction to which he lends himself he must suffer the consequences. *McCahan's Appeal*, 7 Barr (Penn.), 56. And if by his culpable negligence the estate has suffered loss, he must make good the deficiency. 2 Kent, Com. 230; *Royer's Appeal*, 11 Penn. St. 86; 113 N. C. 103. What acts amount to fraud or culpable negligence will depend upon circumstances. Ignorance of duty is equivalent to misconduct, where the ward's interests suffer by it. *Nicholson's Appeal*, 20 Penn. St. 50. And see 34 Wis. 105; 61 Ala. 53; 11 S. C. 551 (unauthorized acts which turn out injuriously).

**366.** A ward's property should not be subjected to the hazards of business, either at the guardian's instance or by mere permission of a probate court.<sup>1</sup> The guardian's responsibility extends only to such property of his ward as is accessible to him. But having once come into possession, or gained knowledge of his right of possession, it is his duty to account for the property; for the law then imposes upon him a *prima facie* liability.<sup>2</sup>

**367.** As to his ward's real estate the guardian has its management and control so long as his general authority lasts. It is his duty to collect the rents for the benefit of his ward.<sup>3</sup>

<sup>1</sup> § 349; Hoyt v. Sprague, 103 U. S. 613; Michael v. Locke, 80 Mo. 548; Bush v. Bush, 33 Kan. 556; Carter v. Lipsey, 70 Ga. 417; 11 R. I. 567 (insane adult); 117 Ga. 819.

<sup>2</sup> Bethune v. Green, 27 Ga. 56; 14 Ala. 419; Martin v. Stevens, 80 Miss. 159. And see Harris v. Berry, 82 Ky. 137 (assets in another jurisdiction); Martin v. Davis, 80 Wis. 376 (liabilities of predecessor).

Courts of equity follow the ward's property whenever wrongfully disposed of or appropriated by the guardian; and any person in whose hands it is found will be held as trustee, if it can be shown that it came into his possession with notice of the trust. Carpenter v. McBride, 3 Fla. 292. See 58 Tenn. 161. The guardian himself may follow his ward's property wherever he can find it, whether into the hands of a former guardian or such guardian's transferee. Fox v. Kerper, 51 Ind. 148. See further, 28 Ga. 327 (legacies charged on land); Gum v. Swearingen, 69 Mo. 553. As to rights of third parties, see 12 Barb. (N. Y.) 84; 11 Gratt. (Va.) 111; Bevis v. Heflin, 63 Ind. 129.

<sup>3</sup> § 350; Flinn Re, 31 N. J. Eq. 640 (agent or collector employed according to custom). He may avow for *damage feasant*, sue for non-payment of rent, and bring trespass and ejectment in his own name. This was the common-law rule as to guardians in socage, and it still applies to testamentary, chancery, and perhaps to probate guardians; for the recognized principle is that such guardians have an authority coupled with an interest, and not a bare authority. 2 Kent, Com. 228; Torry v. Black, 58 N. Y. 185; 3 Md. Ch. 306. Under local statutes different rules may apply. 69 Ill. 108; 126 Mass. 366. In the exercise of ordinary business discretion and subject to the usual rules of agency and bailment, the guardian is liable for his ward's rents which were or should have been collected. 15 Ill. 62; Hughes's Appeal, 53 Penn. St. 500; Spelman v. Terry, 74 N. Y. 448; Peale v. Thurman, 77 Va. 753; 113 N. C. 103. He cannot give the child's rents or use and occupation without consideration even to the child's parent. Cheney v. Roodhouse, 135 Ill. 257; 76 Hun (N. Y.), 186.

The guardian may also lease his ward's lands. But his demise cannot last for a longer period than the law allows for the continuance of his trust; and it will determine upon the ward's death or majority in any event.<sup>1</sup> Where a guardian cultivates his ward's farm instead of letting it out, he is bound to cultivate as a prudent farmer would his own land; otherwise the loss by depreciation of the property in value must be made good by him.<sup>2</sup> The guardian may grant an easement in his ward's lands; but it is of no avail beyond the limit of his guardianship, nor can he authorize waste.<sup>3</sup> Guardians may also assign dower or institute partition proceedings.<sup>4</sup>

<sup>1</sup> A lease made by a guardian, extending beyond the minority of his ward, was once considered void; but the modern rule treats such leases as void only for the excess at the election of the ward. § 350; 2 Kent, Com. 228; 10 East, 494; 7 Johns. Ch. (N. Y.) 150; 20 Hun (N. Y.), 316; *Richardson v. Richardson*, 49 Mo. 29. And the rule embraces assignments of the ward's leases. See statute restriction in 69 Ill. 108; 58 Iowa, 308; 90 Ky. 600; 101 Ill. 110. Cf. 58 Iowa, 308. In some States leases are limited at all events to seven years, or other stated period. The guardian must not lease imprudently, nor so as to sacrifice his ward's interests for the benefit of others. 5 Thomp. & C. (N. Y.) 4; *Thackray's Appeal*, 75 Penn. St. 132. See 1 N. & McC. (S. C.) 369; 4 Gill & Johns. (Md.) 323. So, too, guardians may take premises on lease. *Hannen v. Ewalt*, 18 Penn. St. 9 (lease to guardian personally binding). See 5 Halst. (N. J.) 133. The guardian's power to lease (exclusive of a court's order) extends only to usufruct, and not to exhaustion of the *corpus*. *Stoughton's Appeal*, 88 Penn. St. 198 (oil lands); 53 W. Va. 206.

<sup>2</sup> *Willis v. Fox*, 25 Wis. 646; *Remington v. Field*, 16 R. I. 509; 4 Allen (Mass.), 426. In the exercise of due prudence and good faith he may let out his ward's lands for raising a crop on shares. *Weldon v. Little*, 53 Mich. 1. If he occupy the premises personally, he should account for rent. 34 Hun (N. Y.), 542.

<sup>3</sup> 13 N. H. 360; 1 Vt. 367; 16 Mass. 443; *Torry v. Black*, 58 N. Y. 185; *Bond v. Lockwood*, 33 Ill. 212; 6 Rand. (Va.) 556. A guardian having the means should with due prudence insure buildings, pay taxes and assessments on his ward's lands, and keep the premises in tenantable condition. Local statutes apply considerably in this connection. See 140 Mass. 213 (imprudent loss by tax sale); 61 Iowa, 375; 39 Ohio St. 58 (right of way); 98 Ind. 294; 101 Ind. 200; 64 Iowa, 467. As to partition, see 3 Watts (Penn.), 369.

<sup>4</sup> § 350; 1 Pick. (Mass.) 314; *Curtis v. Hobart*, 41 Me. 230; 2 Ind. 388; 15 Ill. 62; 10 S. & R. (Penn.) 326 (widow as guardian); 63 Kan. 861. See local statutes. 180 Mass. 303.

368. The guardian may execute all the deeds and other writings necessary to the fulfilment of his trust as to real estate, but such instruments should be signed in the name of his ward.<sup>1</sup> It is the guardian's duty to keep the ward's premises in repair, and he may use cash in his hands for that purpose within reasonable limits;<sup>2</sup> but he cannot build or make expensive permanent improvements without a previous order from a court of equity, which in the absence of statute is to be construed strictly.<sup>3</sup>

369. As to the management of personal property, one of the first duties of all trustees is to place the property in a state of security. Guardians in this respect are treated on the same footing as other trustees.<sup>4</sup> Wherever placed and however

<sup>1</sup> § 351; 2 Edw. Ch. (N. Y.) 415. As to excess of authority in such writings, see 15 Pick. (Mass.) 428; *Webster v. Conley*, 46 Ill. 13. And see 2 Doug. (Mich.) 433; *Barney v. Seeley*, 38 Wis. 381.

<sup>2</sup> See *Robinson v. Hersey*, 60 Me. 225.

<sup>3</sup> 7 S. & M. (Mass.) 367; *Miller's Estate*, 1 Penn. St. 326; *Lane v. Taylor*, 40 Ind. 495; *Hassard v. Rowe*, 11 Barb. (N. Y.) 22. But the court will sometimes protect such expenditures, even if not previously authorized, on the ground that the ward has received a benefit thereby; which seems the more reasonable doctrine. 1 Atk. 489; 11 E. L. & Eq. 271; 1 Gratt. (Va.) 143; 90 Ky. 600; *Cheney v. Roodhouse*, 135 Ill. 237. As to construing a court's order, see *Snodgrass's Appeal*, 37 Penn. St. 377; *May v. Skinner*, 149 Mass. 375; 16 Cal. 195. A guardian's stipulation, in his lease of the ward's lands, to pay for improvements, will not bind the ward. *Barrett v. Cocke*, 12 Heisk. (Tenn.) 566. Nor can a guardian's joinder in highway petitions or other illegal acts. 84 Mich. 128; 145 Ill. 658. See 96 Cal. 484.

The guardian's power to borrow money on a mortgage of his ward's lands, and to create liens upon it generally, is regarded, unless upon a judicial order, with very little favor. *Merritt v. Simpson*, 41 Ill. 391; *Lovelace v. Smith*, 39 Ga. 130; 39 Mich. 628; *Edwards v. Taliaferro*, 34 Mich. 13. And see next chapter. Power to sell and convey under a trust does not include power to mortgage. *Tyson v. Latrobe*, 42 Md. 325.

<sup>4</sup> *Choses in action* should be reduced to possession without unnecessary delay. See *Hill, Trustees*, 447, and cases cited (old rule); 28 Gratt. (Va.) 670, 804. Yet incorporeal personalty of various kinds serves in modern times for a long-continued investment. § 352. All claims should be collected as ordinary prudence may require, concerning which the guardian has been put upon inquiry. *Clodfelter v. Bost*, 70 N. C. 733. Land

invested, the ward's funds should in general be separated, by distinguishing marks, from a guardian's private property; otherwise, one makes himself personally liable for loss.<sup>1</sup> The guardian has, as incidental to his office and duties, the power to sell or assign, in the exercise of sound business discretion, his ward's personal property, except, perhaps, as to peculiar incorporeal kinds.<sup>2</sup> Formal acts in beneficial chattel transactions for his ward do not require a judicial order.<sup>3</sup> A guardian has a right to the custody of his ward's personal property and may maintain a suit against others for its possession.<sup>4</sup>

messer's Appeal, 126 Penn. St. 115 (ordinary prudence sufficient). Money temporarily in the guardian's hands should be deposited in some responsible bank of good repute.

<sup>1</sup> Hence, if a guardian deposits money of the ward in the bank to his own account, or takes a certificate of deposit simply to himself, and the bank afterwards fails, he must suffer the consequences. 11 Ves. 377; 7 Sim. 178; *Matthews v. Brise*, 6 Beav. 239; *Atkinson v. Whitehead*, 66 N. C. 296. As to a certificate of deposit, see *Booth v. Wilkinson*, 78 Wis. 652. But exceptions may occur. *Myrick's Prob.* 230; *Law's Estate*, 144 Penn. St. 499. So, if he purchases stock or takes a promissory note in his own name, it will be treated as his own; but not, necessarily, to the ward's prejudice, for it might otherwise be clearly identified and traced as the ward's property. 8 Gill & J. (Md.) 218; 8 Barb. (N. Y.) 48; 17 N. H. 458; *Brown v. Dunham*, 11 Gray (Mass.), 42; *Beasley v. Watson*, 41 Ala. 234. See *Stanley's Appeal*, 8 Barr (Penn.), 431.

As to receiving money due on mortgage and discharging the security, see *Chapman v. Tibbits*, 33 N. Y. 289; *Smith v. Dibrell*, 31 Tex. 239. The debtor is discharged, though the guardian squander the proceeds. 35 La. Ann. 310. The guardian may extend or renew a secure or unsecured note on fair terms; and on a breach may enforce security. 17 Hun (N. Y.), 511; *Taylor v. Hite*, 61 Mo. 142.

<sup>2</sup> 9 Blatchf. (U. S.) 67; *Humphrey v. Buisson*, 19 Minn. 221. The right to assign real estate security is more doubtful than that of assigning a simple note or bond upon personal security or without security. *Mack v. Brammer*, 28 Ohio St. 508. See 11 S. C. 551; *Sheahan v. Wayne*, 42 Mich. 69.

Stock and its transfer follow peculiar rules. *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290 (order of court required). See *State v. Morrison*, 68 N. C. 162.

<sup>3</sup> *Maclay v. Equitable Co.*, 152 U. S. 499 (life insurance transaction).

<sup>4</sup> *Boruff v. Stipp*, 126 Ind. 32.

In collecting outstanding debts or prosecuting claims a reasonable time

**370. A guardian cannot pledge his ward's property, at the common law, so as to bind the ward or the trust fund.<sup>1</sup>**

**371. The guardian is bound to make his ward's funds productive, like all other trustees.** He should see that the capital which comes to his hands is well secured; procure a change of securities whenever necessary; and invest surplus moneys where they may draw proper interest.<sup>2</sup> The investment of the trust funds is therefore one of the most important duties of a guardian, both as respects the interests of his ward and his own security.<sup>3</sup> In this country the management of the

is to be allowed the guardian. Ordinary prudence and diligence is the rule, here as elsewhere. *Potter v. Hiscox*, 30 Conn. 508. He is not to sue in all cases where ordinary modes of collection fail; for the expenses of litigation are to be weighed against the chances of realizing a benefit. §§ 343, 352. It is his duty to contest all improper claims, though presented by the surviving parent, and to hold others concerned to account. 21 Ill. 443; 22 Penn. St. 325; 1 S. C. n. s. 119; 113 N. C. 103; 148 Mass. 431. In the exercise of prudence and good faith a guardian may extend indebtedness, take security, or accept property, real or personal, in settlement of his ward's claim. *Mason v. Buchanan*, 62 Ala. 110; 20 Iowa, 388; 5 Whart. (Penn.) 472; 10 Gill & J. (Md.) 127; *Love v. Logan*, 69 N. C. 70. Whether a debtor be solvent or insolvent, if the guardian loses the chance of realizing, in whole or part, by his supine negligence, he is answerable for the loss. 22 S. C. 243; *Webber's Estate*, 133 Penn. St. 338.

<sup>1</sup> § 352 a; *Hardy v. Bank*, 61 N. H. 34, and cases cited. Statutes generally indicate how the guardian may raise money which he needs. As to pledge in general, see *Schouler, Bailm. Part IV. c. 4.*

<sup>2</sup> § 353. He is allowed a reasonable time (usually six months), and he cannot suffer the ward's money to remain longer idle. *Worrell's Appeal*, 23 Penn. St. 44; 8 Barb. (N. Y.) 48; *Owen v. Peebles*, 42 Ala. 338; *infra*, § 354. But he may keep a suitable surplus on hand for current and contingent expenses; also sums too small to be wisely invested. And family relics and ornaments, household furniture, and farm stock, are generally exempted from the rule of investment. 8 S. & R. (Penn.) 12; 17 N. H. 458; § 353.

<sup>3</sup> Testamentary guardians should follow the lawful direction of the testator in making investments; and for losses strictly arising from such a course they are not responsible. Otherwise, chancery or statute rules of investment must prevail. § 353; *Macphers. Inf.* 266. And see works on Trustees. In many of our States the probate courts are allowed a large discretion, like courts of equity, in such matters; even to changes of investment for the ward's intended benefit. See *Ames v. Ames*, 148 Ill. 321; 58 Iowa, 326; 71 Ala. 240; 75 Mo. 204.



personal estate of infants and others is usually left to their guardian, subject to recognized principles of law which he is bound to follow.<sup>1</sup>

<sup>1</sup> § 353. The English chancery usually gets in all the moneys due the ward and invests in the public funds. *Macphers. Inf.* 266; *State v. Harrison*, 75 N. C. 432; *Durrett v. Commonwealth*, 90 Ky. 312. There are statutes in many States which authorize the investment by fiduciaries only in particular kinds of securities. It is the general rule that either public securities or real securities are to be preferred. *Worrell's Appeal*, 9 Barr (Penn.), 508; *Nance v. Nance*, 1 S. C. n. s. 209. Investments in bonds of the United States, or of the State having jurisdiction of the ward, are doubtless proper; so mortgage investments on first-class property within the State, and city and town securities, are frequently designated as suitable investments. But the stock of railway, navigation, and other incorporated companies, whose stability is uncertain, is unsuitable; and corporate bonds are a security preferable to their stock. *Worrell's Appeal*, 23 Penn. St. 44; *Allen v. Gaillard*, 1 S. C. n. s. 279; *French v. Currier*, 47 N. H. 88. For investments in the Southern Confederacy securities, see § 353; *Lamar v. Micou*, 112 U. S. 452 (unlawful). See as to bank stock, *Haddock v. Planters' Bank*, 66 Ga. 496; *Watson v. Stone*, 40 Ala. 451. For small sums of money savings banks of good repute may be found convenient. And while, in some States, fiduciary officers are strictly limited by legislation in their investments, in others there is no favored stock or security prescribed, and they are only bound to exercise reasonable prudence and sound faith. *Kimball v. Perkins*, 130 Mass. 141; *Nance v. Nance*, 1 S. C. n. s. 209; 62 Barb. (N. Y.) 622. As to fair prudence, where loss resulted, see *Slauter v. Favorite*, 107 Ind. 291; 78 Va. 297; *Jack's Appeal*, 94 Penn. St. 367. If a doubtful investment, made in good faith, turns out advantageous to the ward, the guardian should not be harshly dealt with on his final settlement. §§ 355, 356. For losses which are without the protection of such a rule, the guardian or other trustee is always personally responsible; and loans on the mere credit of a single individual or of a single firm, or with very doubtful security, are not usually sustained. *Wyckoff v. Hulse*, 32 N. J. Eq. 697 (child's parent); 4 Johns. Ch. (N. Y.) 281; 122 Ind. 548; 3 Met. (Ky.) 548; *Clark v. Garfield*, 8 Allen (Mass.), 427; 34 Ill. 112; *Lee v. Lee*, 55 Ala. 590. *Aliter* as to prudent transactions in dealing with failing debtors, &c. Investments in the indorsed notes of parties will depend upon the standing of such parties. 4 Allen (Mass.), 426; *Fletcher v. Fletcher*, 29 Vt. 98; *Covington v. Leak*, 65 N. C. 594; 78 Va. 574. Loans to individuals with good collateral security are upheld, in the absence of a restrictive statute. 20 Pick. (Mass.) 116. See 2 Redf. (N. Y.) 486. Speculative investments may not be made by fiduciaries with their trust funds. As to loans sanctioned by the court, see 12 Ala. 354; 10 Md. 440; *Newman v. Reed*, 50 Ala. 297; 103 Ill. 142.

372. The guardian is chargeable with interest for a breach of duty in such respects. And where he carelessly suffers cash balances to remain idle in his hands, or mingles the ward's money with his own, he is chargeable not with interest only, but in case of fraud or positive misconduct with compound interest.<sup>1</sup> Where a guardian speculates with his ward's funds, or employs them in his own business, he must account for the profits; and as this is a clear breach of trust, compound interest is properly chargeable, or, perhaps, the profits of his speculation instead.<sup>2</sup>

<sup>1</sup> § 354; *Barney v. Saunders*, 16 How. (U. S.) 535; 8 Ired. Eq. 285; 13 E. L. & Eq. 304; *Stark v. Gamble*, 43 N. H. 465; *Mackin v. Morse*, 130 Mass. 439; *Tyson v. Sanderson*, 45 Ala. 364; *Rawson v. Corbett*, 150 Ill. 466. But see 29 Miss. 250. Compound interest should not be charged where there is no wilful breach of duty; nor where the ward, on coming of age, voluntarily leaves the money in the late guardian's hands without a demand. 142 Ill. 357. A familiar rule charges the guardian with interest for neglecting to invest his ward's money after six months; yet deferring interest for that length of time is not invariable, but depends upon the circumstances. There are cases in which a guardian would not be charged for delaying to invest, even with simple interest, it appearing on proof that he could not do so advantageously by exercising due diligence. *Brand v. Abbott*, 42 Ala. 499; *Ashley v. Martin*, 50 Ala. 537. At the present day there are banks or trust companies which allow small rates of interest on balances subject to check. See *Crosby v. Merriam*, 31 Minn. 342; *Thurston Re*, 57 Wis. 104. His mere delinquency to invest should hardly charge him with compound interest. In all such cases courts of chancery have exercised a liberal discretion, according to the circumstances. § 354; 2 Kent, Com. 231, and note *ib.*, and cases cited. Compound interest should cease on the ward's arriving at full age, and simple interest only be charged thereafter. *Tanner v. Skinner*, 11 Bush (Ky.) 120. And, pending a judicial decree upon his final balance, one is under no obligation to invest and should not be charged interest unless he has made use of the fund or earned interest. *Mott Re*, 26 N. J. Eq. 509. Mere failure of the guardian to file annual accounts does not render him liable for compound interest. *Ashley v. Martin*, 50 Ala. 537. He should be so charged only in cases of fraud or flagrant breach of trust. *Thurston Re*, 57 Wis. 104. And see *Shaw v. Bates*, 53 Vt. 360.

<sup>2</sup> § 354; 9 Rich. Eq. (S. C.) 184; *Lowry v. State*, 64 Ind. 421; *Reed v. Timmins*, 52 Tex. 84. See further 9 Humph. (Tenn.) 612 (usury); 6 Iowa, 123; 32 Mo. 489; 17 Ala. 306. As to speculation in stock see *French v. Currier*, 47 N. H. 88; *Lamb's Appeal*, 58 Penn. St. 142; 8 Allen (Mass.), 15. It would seem to be the true rule, where large profits are

**373.** In all matters of investment or reinvestment, the same principles would be held to apply to a guardian as to general trustees.<sup>1</sup>

thus appropriated by a fiduciary, to require them to be turned in on account; and to impose compound interest instead, with annual or other periodical rests as a penalty, only when there are practical difficulties in the way of enforcing such a rule, or as a beneficial option to the ward. For it is obvious that in this country a guardian can frequently afford to pay compound interest for the use of his ward's money, if he is suffered to retain the full profits of the speculation for himself. Where the guardian's investment in his own business or speculations is followed by his own insolvency, the ward gains no priority over other creditors if the fund cannot be traced out and identified; and this subjection of a ward's capital to utter loss is a strong reason for discouraging it. § 354; 70 Md. 78.

<sup>1</sup> And since such questions have arisen usually under testamentary trusts, and not as between guardian and ward, the reader is referred to works on that subject for a fuller exposition of the law. See Hill, Trusts, 379-384; Perry, Trusts, cs. 14, 21. It is to be borne in mind that the standard for such fiduciaries when recompensed, is that of ordinary care and diligence, with good faith besides. § 354 a.

## CHAPTER VII.

### SALES OF THE WARD'S REAL ESTATE.

374. In sales or purchases of a ward's personal property, a liberal rule applies in the courts so long as the change is, at the most, simply from one species of personal estate to another.<sup>1</sup>

375. But as to a ward's real estate it is different, and chancery has no inherent original jurisdiction to direct the sale of lands belonging to infants.<sup>2</sup>

<sup>1</sup> § 355.

<sup>2</sup> § 356. The common law appears to have treated lands belonging to infants as property which should be preserved intact until the owner became of sufficient age to dispose of it according to his own pleasure. Timber might be felled, and mineral ore dug out and carried away; but though such acts constituted a technical conversion of real estate, they were in effect but a mode of enjoyment of the profits, and the guardian was obliged to account for these products of the soil to the infant owner. See *Stoughton's Appeal*, 88 Penn. St. 198. Sales of the ward's lands were authorized in certain cases, as where there were debts to be paid, encumbrances to be discharged, judgments to be satisfied, or necessary repairs to be made upon the premises. But in such cases the court of chancery violated no rights of ownership; since it is the universal doctrine that property can only be held subordinate to the obligation of paying one's debts. *Shaffner v. Briggs*, 36 Ind. 55; *Howarth Re*, L. R. 8 Ch. 415. And see L. R. 14 Eq. 251; L. R. 6 Ch. 850 (reversionary interest of an infant); *ante*, 364, 367. Mortgages were in rare instances permitted. See *Jackson Re*, 21 Ch. D. 786. Courts of chancery went no further, except when authorized by statutes. They preferred that the infant's property should remain, while guardianship lasted, impressed with its original character. In the settlement of estates, personal property was to be taken to pay what was needful for support and maintenance, rather than lands. Not even purchases of real estate were favorably regarded. And when a sale became necessary, the real estate was not resorted to until other means of raising money had failed; nor was a general sale of the lands ordered whenever a partial sale would suffice. § 356. See 2 Ves. 23, per Lord Hardwicke; 1 Moll. 525; 3 Bland (Md.), 186; 16 Ala.

376. Legislative authority may now intervene to direct the sale of an infant's lands. And since the ownership of real estate in this country is vested with comparatively little of that sanctity and importance which the ancient laws of primogeniture and feudal tenure threw about it, and inasmuch as purchases and sales of land are fast becoming matters of every-day occurrence, the legislatures of most of the United States have seen fit to enact laws for facilitating absolute sale of real estate by fiduciary officers.<sup>1</sup>

409; 4 Johns. Ch. (Ky.) 619; 18 Gratt. (Va.) 651. And see as to purchases, § 357; 11 Ves. 278; 19 Ves. 122.

One objection to conversions of property, — viz., that the laws of inheritance are not the same in real and personal estate, — became obviated in equity by treating the proceeds throughout as impressed with the character of the original fund; a rule of large application both in England and America. § 357; Macphers. Inf. 284; Story, Eq. Juris. §§ 790-793; 2 Kent, Com. 230, and n. Cf. 4 Barr (Penn.), 359. Another objection, raised under the old law of an infant's testamentary dispositions, is now obsolete. § 357. For the civil law rule see § 358; 32 Tex. 495.

<sup>1</sup> § 359. See also (1893) 1 Ch. 153. Such statutes are comparatively recent, and not altogether uniform in their provisions, though alike in most essential features. They may apply, not to guardians alone, but also to trustees, executors, and administrators. Since such statutes are purely local and subject to local variations, they need not here be dwelt upon.

Relative to the sale of lands belonging to infants: (1) an application to the probate or other court is made, with suitable reason or purpose stated, upon which the order of sale issues. (2) A special bond is filed by the guardian. (3) The formal sale of the land follows, usually at public auction. (4) A deed is given to the purchaser. (5) A proper disposition of the proceeds of the sale is provided. And in some States a judicial confirmation of the sale is required. The judicial order of sale is frequently termed a license; and the exact method of procedure is indicated in the statutes themselves. § 360 and cases cited. Sale cannot be made after the ward's death. 65 Tex. 37; 96 Me. 166; 132 Cal. 99. And see 40 Ark. 219 (guardianship ended). Where the guardian's appointment was absolutely void, the sale is likewise void. 87 Ga. 74. But a merely irregular appointment is not to be assailed. 153 Penn. St. 493. The legislative provision sometimes extends to sale of a minor's reversionary or equitable interest. The statute operates only where the land lies. 77 Miss. 456. The guardian supervises his sale and cannot delegate his general authority or responsibility. 89 Ill. 357; 41 N. J. Eq. 516.

As to the disposition of the proceeds, the guardian's conduct is to be regulated by the terms of his license. 8 Allen (Mass.), 125; 21 Ind. 207;

**377.** Mortgages are sometimes authorized on an infant's lands, under statute proceedings analogous to those empowering a sale;<sup>1</sup> or the sale of an undivided interest of a minor in land, as tenant in common or otherwise.<sup>2</sup> Or a guardian's sale is made subject to an existing mortgage.<sup>3</sup> In all such cases the guardian should keep within the scope of judicial and legislative permission.<sup>4</sup>

11 Pick. (Mass.) 113. The guardian's deed has usually only the effect of a quitclaim, except so far as he may have covenanted on his part that he has complied with the statute requisites and that he is the guardian duly authorized; and in general he cannot bind his ward by any covenants of warranty in the deed, though if he choose to warrant he may bind himself. The purchaser in such sales usually takes all risks of title except as concerns the authority and good faith of the guardian in the premises. § 360; 28 Ind. 138; 62 Ga. 591; 54 N. H. 578. But see 32 Ark. 321 (misrepresentation).

The most difficult question which arises under the statutes relating to sales of the infant's lands, is that of the essentials of the purchaser's title. § 361. The rule laid down, in this respect, is not uniform in different States; and the practitioner should carefully consult the local code and course of decision. See also 29 Ill. 165; 3 Iowa, 114; 33 Barb. (N. Y.) 176; 39 N. H. 110; 6 Jones (N. C.), 334; 28 Ala. 218; 29 Mo. 271; 41 Penn. St. 120; 12 Mich. 356; 43 N. H. 309; 19 Wis. 689; 22 Wis. 611; 22 Iowa, 11; 90 Tenn. 445. Presumptions favor jurisdiction and oppose collateral attack. 47 Kan. 58; 129 Ind. 529; 51 Ark. 338. Difficulty is set at rest in some States by a statute provision as to the essential particulars which a *bona fide* purchaser is bound to notice. 51 Wis. 487. See further as to such details, § 361 and cases cited.

The purchaser may sometimes maintain a bill in equity for rescinding the sale on account of illegality. But he must offer to surrender possession and to account for the use and occupation of the premises. *Shipp v. Wheelless*, 33 Miss. 646; *Loyd v. Malone*, 23 Ill. 43; *Anderson v. Layton*, 3 Bush (Ky.), 87. And see 95 Mich. 244; 15 Gratt. (Va.) 551; 90 Ga. 550 (avoidance by ward for fraud or collusion); 53 Ark. 224. The guardian's tender of a deed with proper recitals and covenants should be accepted, but not one with misrecitals. 44 Minn. 250. A court may refuse to confirm or may set aside a sale because of gross inadequacy of price or other unfairness to the ward's interest. 50 Mo. 438. And a guardian in general can only safely accept money in payment of the purchase price. 51 Cal. 352. See 41 Ind. 436; 161 Mass. 525.

<sup>1</sup> 65 N. Y. 294; 85 Ill. 618; § 352.

<sup>2</sup> 67 N. Y. 231; 51 Wis. 669; 51 Cal. 352; 62 Miss. 244.

<sup>3</sup> See 36 Mich. 238; 13 R. I. 65.

<sup>4</sup> *Kingsbury v. Powers*, 131 Ill. 182; § 361 *a*.

378. Sales of land in cases of non-residents are also the subject of our local legislation.<sup>1</sup>

379. Chancery in some States claims authority in such matters, aided by local statute or otherwise.<sup>2</sup>

380. The guardian's own sale of land, belonging to his minor ward, without an order from the court either by virtue of statute or chancery jurisdiction, is not binding upon the minor; and such ward's interest, legal or equitable, can only be divested by a sale under proper judicial sanction.<sup>3</sup>

<sup>1</sup> § 362; 2 Fairf. (Me.) 99; 34 Md. 675; 7 Baxt. (Tenn.) 210.

<sup>2</sup> § 363. For the more limited rule, see *Horton v. McCoy*, 47 N. Y. 21 (partition); *Cole v. Gourlay*, 79 N. Y. 527; 67 N. Y. 231 (guardian required to correct error); 9 Paige (N. Y.), 365; 44 N. Y. 249. And see *Palmer v. Garland*, 81 Va. 444; 87 Va. 676. Aside from statutory aid the claim is made positively in several States that chancery has inherent jurisdiction to order the sale of lands belonging to infants for their proper support and education, or more broadly still for their benefit. *Shumard v. Phillips*, 53 Ark. 37; *Thaw v. Ritchie*, 136 U. S. 519; *Hamer v. Cook*, 118 Mo. 476; 148 Ill. 321; 146 Ill. 227; 87 Va. 676; 53 Ark. 37. In numerous decisions the rights of infants in lands are protected in equity, so far as to give the infants opportunity to confirm or set aside a sale of real estate and so as to prevent them from being bound by a transaction to which they could not be parties in their own right. § 363; 44 Miss. 376; 28 Wis. 221; 53 Ill. 233; *Terry v. Tuttle*, 24 Mich. 206; 50 Mo. 604; *Walke v. Moody*, 65 N. C. 599; *Downin v. Sprecher*, 35 Md. 474; 3 Head (Tenn.), 517; *Spring v. Kane*, 86 Ill. 580. General jurisdiction denied in selling land where an adult had a part interest. 72 Md. 264.

<sup>3</sup> § 364; *Wells v. Chaffin*, 60 Ga. 677; *Morrison v. Kinstra*, 55 Miss. 71.

Such sale is usually public; but the court is sometimes allowed at discretion to order and sanction a private sale. 45 Ind. 361. A will or deed of gift may confer a power. 69 Ga. 832.

As to lapse of time and laches on an infant's part after reaching majority, see c. 9, *post*; 43 N. Y. 218; 52 Miss. 475. And see 51 Ala. 514; 36 Ind. 55; 51 Wis. 669.

## CHAPTER VIII.

### THE GUARDIAN'S BOND, INVENTORY, AND ACCOUNTS.

**381.** In English chancery a recognizance is sometimes taken, and the rule appears to be that guardians of the estate give security for the performance of their trust, but guardians of the person none. Special circumstances may, however, arise for requiring recognizance from the latter.<sup>1</sup>

**382.** In this country probate guardians furnish bond and manage both person and estate of a ward. The practice which has grown up in most of the States, as well as our statute law, places guardians, in many respects, on the same footing as executors and administrators. Like such officers they give bonds, file inventories, and render regular accounts to the court; and the same principles which apply to the one class, in these respects, apply also to the other.<sup>2</sup> A probate guardian, before receiving from the court his letters of appointment, is obliged, therefore, to give bond, with good security, for the faithful performance of his trust.<sup>3</sup>

<sup>1</sup> § 365; Macphers. Inf. 108, 348, 553. The receiver gives security. Macphers. Inf. 266. As to chancery practice in New York, see 4 Paige (N. Y.), 44; 7 Paige, 596. But as these three requirements have main reference to the ward's property, little or no practical necessity exists for pursuing a guardian who neglected to qualify or file inventory or account where there were no assets of the infant.

<sup>2</sup> § 366.

<sup>3</sup> See local statute as to the tenor of such a bond. It stipulates for custody, education, and maintenance of an infant ward; and the penal sum, as in other cases, is fixed at about double the amount of the estate. Sureties are to be approved by the court, and the bond, made out to the judge or his successors in office, is placed on file for the benefit of all concerned. § 366.

In general, sureties as well as the guardian are estopped by the delivered bond itself from denying its legal effect on the ground of fraud by the guardian, or arrangements with him as to other signatures, &c., to which the court, the ward, and parties to be protected by the bond were



383. The bond of a probate guardian renders him and his sureties liable for all estate of the ward which shall come to his possession or knowledge. It embraces chattels and rents and income from every species of property that the guardian actually receives in his official capacity, or that he might have received if he had faithfully performed his duties.<sup>1</sup>

not privy. 45 Wis. 458; 5 Gill & J. (Md.) 102; 72 Mo. 603; 42 Mich. 501. Even if the guardian's appointment was void for want of jurisdiction, the sureties are held liable with him for his *quasi* guardianship under which he obtained the property. 50 Ala. 315. If the appointment was simply voidable the surety is estopped. 156 Penn. St. 301. And see 102 Ind. 214; 78 Me. 24; 49 Conn. 83; 82 Ind. 126.

A probate bond may be good, though inartificially drawn, if substantially in compliance with the statute. 27 Vt. 202; 34 Ala. 15; 42 N. J. L. 15; 13 Gratt. (Va.) 175. A bond is not to be avoided for slight defects committed through carelessness or error. In some instances defective bonds have been cured in equity, so as to hold both principal and sureties, and have been made enforceable even though void at law. 1 Johns. Ch. (N. Y.) 607; 4 Jones, Eq. (N. C.) 361; 7 Humph. (Tenn.) 310.

The true principle which distinguishes such cases seems to be that the identity of the parties should sufficiently appear. 102 Penn. St. 434; 69 N. C. 175; 16 Ohio St. 455; *Richardson v. Boynton*, 12 Allen (Mass.), 138; 41 Ark. 254; § 366.

Where there are several wards, one probate bond is sufficient for all. 3 R. I. 205; 42 N. J. L. 15. But separate bonds for each ward would not be improper, and, in some instances, might be even preferable. Natural guardians are not required to give bond. As to testamentary guardians, see *supra*, cs. 1, 2; 9 Fla. 289; 13 Phila. 213; 57 Fed. (U. S.) 966.

<sup>1</sup> § 367; 13 Gray (Mass.), 387; 31 Miss. 36; 33 Ill. 212; 38 Me. 47; 2 Heisk. (Tenn.) 337; 53 Ind. 321. Bond given tardily dates back in effect by relation. 77 Mo. App. 310. Property received from abroad by the guardian is covered by his bond. 1 Met. (Ky.) 507; 135 Mass. 69; 77 Mo. 463. But while the property is beyond his reach, and cannot be obtained without a foreign appointment, the liability of his bondsmen would not seem to extend beyond a general dereliction of duty on his part in neglecting the proper means of obtaining it. § 367. See 67 Tex. 483; 2 Allen (Mass.), 394; 2 Rich. Eq. (S. C.) 68; 32 Md. 1; 94 N. C. 194; 22 S. C. 147; 81 Ky. 158; 90 N. C. 72; 81 Ind. 455; 80 Ind. 155; 12 Allen (Mass.), 138. The bond of guardians of foreign wards, appointed for recovering estate situated in their own State, binds them to account only for such property, nor can they be held liable for the custody of the wards while the latter remain non-residents. A legacy due from the executor

The liability of sureties lasts to the full extent of the penal sum named in the bond, while the responsibilities of the guardianship continue, and it does not terminate by the resignation or death of the guardian; for the ward's estate in the guardian's hands or subject to his control at the time of his resignation or death, they continue liable.<sup>1</sup>

of the ward's father, and other estate lawfully payable to the guardian by the executor, must all be accounted for, and for this the guardian's sureties are doubtless liable. The bond covers property of the ward obtained by the guardian and disposed of before his appointment and charged in account. But for property unlawfully received by the guardian, see 64 Ohio St. 343 (guardian a defaulter); 61 Md. 471; Perkins v. Tooley, 74 Mich. 220; 121 Ind. 187; 99 Mo. 609; Richardson v. Boynton, 12 Allen, 138.

<sup>1</sup> § 367; 13 Ala. 458; 28 Ind. 306; 23 Ark. 163; 114 N. Y. 359; 84 Conn. 109. The estate of a deceased surety is liable for a default of the guardian which occurred after such surety's death, and before final settlement of the trust. 47 Ind. 345; 64 Ind. 573. See 127 Mass. 268. Under the prevalent statute rule, no action can be maintained on the bond of a probate guardian until after a citation to account and a decree which establishes a default on his part. 114 N. Y. 359. Sureties are liable so long as the official bond can be sued at all. 13 Gray (Mass.), 561; 55 Ga. 15. But a surety may be discharged at any time upon his petition, and after due notice to all parties interested (as statutes provide); and thereupon the court will order the guardian to furnish new security, and, upon his failure to do so, may remove him; such surety remaining liable, however, until the new bond is approved, and for any previous misconduct or culpable mismanagement committed by the guardian. 11 Humph. (Tenn.) 273; 2 Rich. (S. C.) 80; 42 Ohio St. 549; 80 Ind. 350; 70 Miss. 234. And see 18 Ala. 458; 77 Me. 197; 87 Ind. 109 (co-sureties in an additional bond). A surety may sign an old guardian's bond as well as a new one, in the stead of a retiring surety. 15 Lea (Tenn.), 618; 103 Ill. 142. One surety cannot be discharged from his liability without the other, unless the latter by words or acts shows his consent to remain solely responsible. See 43 Penn. St. 43; 21 Ark. 447; 3 Bush (Ky.), 644. And see 101 Ind. 284; 88 Ind. 65; 68 Cal. 82; § 367.

Where the guardian has filed an additional bond, as in case of a large accession to the original estate, both bonds remain valid, the new bond is taken as a cumulative security and the sureties (as such statutes are generally construed), are all deemed co-sureties, and liable as such. 3 Cush. (Mass.) 465; 36 Penn. St. 442; 61 Ind. 263; 88 Ga. 722. See 57 Iowa, 63; 87 Ind. 109. Where, however, the sureties of an old bond are discharged and a new bond is substituted, the usual rule is that the old sureties and the new are liable together as co-sureties for the defaults of

**384.** Many of the decisions in regard to administration bonds apply on principle to those of guardians.<sup>1</sup> Thus, joint guardians who wish to limit their respective liabilities must furnish separate bonds; since both are responsible for all the acts of each other during the continuance of the joint guardianship where they execute a joint bond.<sup>2</sup>

**385.** A special bond is in many States required where a guardian is licensed to make sale of his ward's real estate. Where real estate has been sold by a guardian, and the proceeds remain unaccounted for at the expiration of his trust, it is a question whether the sureties on his general bond shall be held responsible, or those on the special bond given for sale of the real estate.<sup>3</sup>

the guardian, previous to filing the new bond, and that the new sureties alone bear the responsibility of his subsequent misconduct. § 387. The language of a local code must be resorted to for the rule in such cases. A periodical statutory bond is required in some States, and even such bonds are held to be cumulative, under the statute, as to the wards, though contribution is in inverse order of execution. *Tennessee Hospital v. Fuqua*, 1 Lea (Tenn.), 608. See further, 50 Wis. 589; 89 Mo. 470; 60 Miss. 987; 44 Ohio St. 178; 63 Miss. 183; 59 Wis. 543; 67 Ala. 406; 84 Ind. 433. Contribution is in proportion to the penal sum named in the respective bonds. But see 144 Penn. St. 383 (new surety accepted upon qualified terms of liability).

<sup>1</sup> Thus a bond which is not signed by the guardian is not binding even upon his sureties. 2 Pick. (Mass.) 24 (alteration without consent); 102 Penn. St. 434 (fraud); § 368. And see 2 Gray (Mass.), 556.

<sup>2</sup> 5 Pick. (Mass.) 96; 9 Vt. 41; 1 Watts (Penn.), 365. But see 19 Ala. 277.

No more than the penal sum named in a bond can be recovered upon it, unless it be by way of interest or costs. 45 Ala. 364; 38 N. J. Eq. 205.

<sup>3</sup> § 369. See 13 Gray (Mass.), 387; 38 Me. 47; 11 Cush. (Mass.) 22; 23 Ind. 607; 90 Penn. St. 350; 51 Iowa, 152; 65 Iowa, 106; 35 Kan. 156; 4 Nev. 429; 6 B. Monr. (Ky.) 292; 125 Penn. St. 542; 83 Me. 195. See *Andrews's Heirs Case*, 3 Humph. 592. In some States the requirement of an additional or special bond in such case is matter of judicial discretion. See 52 Miss. 238. In other States such bond is auxiliary and postponed to the original bond. 21 Fla. 136. See 62 Miss. 786; 69 Ind. 257; 71 Ind. 52; 68 Iowa, 52. In case of inevitable doubt, suit may be brought against either set of bondsmen. 80 Ind. 350. And see 132 Ind. 461; 96 N. Y. 260; 142 N. Y. 545.

Surety liable on general bond for rents and profits of ward's land in guardian's possession. 62 S. C. 306.

386. To file an inventory of the ward's property is one of the probate guardian's first duties after his appointment. This inventory is a schedule, prepared by discreet and disinterested persons, and verified by their oath, wherein the amount of the ward's estate, both real and personal, together with the separate items, are duly entered at a just valuation. The inventory serves as the basis of the guardian's accounts, and primarily fixes his liability.<sup>1</sup>

387. The accounts of guardians or of quasi guardians are in England subject to the direction of the court of chancery.<sup>2</sup> Under our American statutes probate guardians, duly ap-

<sup>1</sup> § 370. Here again the statute relative to infants borrows from the long-established practice of the English ecclesiastical courts, with regard to the administration of estates. But one inventory is in general necessary; and if subsequent effects come to the guardian's hands, he will place them in his accounts to the ward's credit. Though probate inventories are *prima facie* evidence of the existence of assets and their true valuation, they are by no means conclusive; and the guardian may show, in rendering his accounts, that he was not chargeable with certain items which therein appeared, or that the just sale of property realized less than its appraised worth; and he will be credited accordingly. On the other hand, property omitted from the inventory, which comes within the guardian's reach in any manner, should be accounted for, as well as all gains realized over and above the appraisers' valuation. During the long period for which a guardian's authority frequently lasts, the inventory may become of little practical consequence, except as furnishing for himself the starting-point in his system of accounts, and determining, for the convenience of others interested, the fact and extent of his original liability. And as the ward's real estate is to be preserved intact unless a sale is ordered, the guardian's account, like that of an administrator, starts usually in this country with the amount of personal estate according to the inventory, taking into his reckoning only the income and expenditures from the real estate until some sale of land is actually made. If two or more persons under guardianship are interested in different property, or have unequal interests in the same property, separate schedules should be rendered for each. § 370; *State v. Stewart*, 36 Miss. 652; *Clark v. Whitaker*, 18 Conn. 543; *Green v. Johnson*, 3 Gill & J. (Md.) 388; *Fogler v. Buck*, 66 Me. 205; 3 Baxt. (Tenn.) 249. And see, as to inventories generally, 1 Wms. Ex'rs, 878-883; Schouler, Ex'rs, Part III. c. 2. Summary removal is the penalty for disregard of a court's order to file. 124 Ind. 250.

<sup>2</sup> § 371. In English practice a guardian seldom accounts without suit, though receivers account regularly. Macphers. Inf. 108, 259, 348.

pointed, are invariably made liable to account, in the first instance, to the local court issuing letters of guardianship, which thus becomes, in fact, the general depository of accounts relative to the estates of deceased persons and wards. The immediate and primary jurisdiction over the settlement of guardians' accounts is usually, therefore, in the probate court.<sup>1</sup>

<sup>1</sup> § 372. But chancery may supervise on appeal or supply, under our usual system. 1 Gill (Md.), 367.

An important distinction is observable concerning the accounts of probate guardians, between the final account and those rendered from time to time, as the local practice may require, pending the minority of the ward. The rule is that these intermediate accounts, although judicially approved and passed, are by no means conclusive. They serve to show the guardian's liability and to keep the court informed of the general condition of the trust funds, to determine when the guardian's bond should be increased, and to ascertain as to the propriety of sales and investments. Such accounts remain *prima facie* evidence of the sum of the guardian's indebtedness to his ward, and are *prima facie* correct accounts but nothing more. Douglas's Appeal, 82 Penn. St. 169; 50 Ala. 537; 6 Heisk. (Tenn.) 33; Davis v. Combs, 38 N. J. Eq. 473; 89 Mo. 470; 62 Md. 427. See 104 N. C. 566; 87 Ala. 406. They are in some States merely recorded without being allowed. But on the final account of the guardian, which is to be rendered at the expiration of his trust, the question comes before the court as to the general fairness of his management, and items allowed in former accounts may then be stricken out as improper. The reason of this is that the *cestui que trust* had no earlier opportunity of judging as to the correctness of the trustee's accounts, and ascertaining that final balance, which is, after all, the estate in controversy. So, too, a guardian in his final account should be allowed to correct errors to his prejudice, satisfactorily proved to exist in his prior accounts, both as to matters of form and substance. 40 Miss. 765; Blake v. Pegram, 101 Mass. 592; 81 Ala. 435. The final account once examined and approved by the court, and not reversed on appeal, the ward's period of objecting to the same having also expired by limitation, such account, together with all which preceded it, concludes all parties interested, inclusive of the guardian and his own representatives, as to all matters involved in the settlement, and cannot be reopened or annulled in any court; certainly not unless by direct proceedings to obtain a reversal, or setting aside for fraud or manifest error: perhaps in some States not at all. 31 Ala. 167; 29 Miss. 250; Cummings v. Cummings, 128 Mass. 532; 73 Ind. 573; 48 Ind. 391; 142 Ill. 357; Brent v. Grace, 30 Mo. 253; Yeager's Appeal, 34 Penn. St. 173; Smith v. Davis, 49 Md. 470. Similar rules apply often, as in settlements by executors

**388.** Guardians sometimes make settlements out of court, rendering no returns; but this practice is not common where the infant's estate is large; nor is it safe, since the failure to account is a breach of the guardianship bond, and renders the sureties and the guardian himself liable.<sup>1</sup> The final account is not allowed by the court, at the ward's majority, until the ward has had the opportunity of examining it.<sup>2</sup> But on the termination of a guardian's trust, pending the infancy of the ward, a final account is sometimes allowed after due notice to all parties interested, and examination by a suitable guardian *ad litem* on the ward's behalf.<sup>3</sup>

**389.** Where the same person is both executor of the parent's estate and guardian of the infant heir, he should first settle his executor's account, and then transfer the balance by way of distributive share to the account of guardianship.<sup>4</sup> Where a guardian dies, resigns, or is removed, his final account must

and administrators, or by trustees. See 52 Miss. 82; 51 Ala. 75; 85 N. C. 199; 103 Mo. 402 (matters collateral not concluded); 91 Cal. 565; 112 Mo. 661. The guardian's final account should purport on its face to be such. As to beginning final account with preceding balance, cf. 55 Penn. St. 428; 32 Ohio St. 18.

The accounts of wards having different and unequal interests in property should be kept distinct and rendered separately. 9 Gratt. (Va.) 372; *State v. Foy*, 65 N. C. 265; 32 W. Va. 215; 38 Ark. 482; *Wood v. Black*, 84 Ind. 279. See *Nance v. Nance*, 1 S. C. n. s. 209.

<sup>1</sup> § 372. As to party in interest and lapse of time, see 4 Cush. (Mass.) 510; 15 N. H. 190; 31 Me. 254; *Smith v. Davis*, 49 Md. 470; *Rawson v. Corbett*, 150 Ill. 466. Where no effects have come to the guardian's possession or knowledge, he need not file either inventory or account; but so soon as there is property his liability becomes fixed. *McGale v. McGale* (1894), R. I.

<sup>2</sup> *Woodbury v. Hammond*, 54 Me. 332; 7 S. & M. (Miss.) 740; *Libby v. Van Derzee*, 176 N. Y. 591 (limitations).

<sup>3</sup> § 372. See 86 Cal. 651; *Blake v. Pegram*, 101 Mass. 592; 60 Ala. 133; *Glass v. Glass*, 80 Ala. 241. As to accounting with successor, &c., see 27 Gratt. (Va.) 651; 61 Ga. 137; 64 Ala. 98; 72 Mo. 272; *King v. Hughes*, 52 Ga. 600. See 135 Ill. 257; 140 Ill. 603; *Ellis v. Scott*, 75 N. C. 108; 61 Ga. 137 (no collusive settlement).

<sup>4</sup> § 373; 13 Gray (Mass.), 387; 3 Md. Ch. 306; 5 Harring. 94; 3 Halst. Ch. (N. J.) 101; 9 Rich. Eq. 408. See *McIntosh's Estate*, 158 Penn. St. 525; 57 Ala. 628 (blending accounts as guardian and trustee).

be presented, and it is the successor's duty to see that the former guardian is held to a strict compliance with his bond; since otherwise he may make himself liable to the ward.<sup>1</sup>

**390.** The general principles on which guardians are considered liable in the settlement of their accounts have been already set forth.<sup>2</sup> Rules of equity still prevail to a considerable extent

<sup>1</sup> *Sage v. Hammonds*, 28 Gratt. (Va.) 651.

As to deceased guardian, see 15 N. H. 190; 29 Ga. 82; 36 Vt. 164; 19 Barb. (N. Y.) 30; 26 Mo. 87; 7 Bush (Ky.), 214; 91 Mich. 490. See 79 N. C. 396; 65 Cal. 228; 33 W. Va. 724; 1 Pick. (Mass.) 198 (deceased surety); 1 S. C. N. s. 119, 304. See also 2 Ashm. (Penn.) 441 (attorney of absentee). A guardian cannot be cited to render a final account before the ward's majority, unless his trust has been first determined; and his balance should, in such case, be paid to a successor. *Hughes v. Ringstaff*, 11 Ala. 564; *Lewis v. Allred*, 57 Ala. 628; 80 Ala. 241.

At any time before final settlement and discharge of the guardian *ex parte* orders made by the court may be set aside, corrected, and modified; though they may not be collaterally attacked. *State v. Wheeler*, 127 Ind. 451. See *Starrett v. Jameson*, 29 Me. 504 (omissions from account). The accounts should include only transactions between guardian and ward; since the relation is in other respects as between debtor and creditor. 4 Gratt. (Va.) 43; 2 Watts (Penn.), 295. Valuations should be reduced to the lawful standard of currency. 41 Miss. 411; 40 Ala. 498. All items are not necessarily proved by vouchers; small charges may be allowed on the guardian's oath; and oral proof is frequently admissible as in the settlement of other probate accounts. The judicial disposition is to adjust items without resort to a needless circuitry of litigation. *Cutts v. Cutts*, 58 N. H. 602; 148 Mass. 434. Nor will a court be captious over slight irregularities of form where it appears that the guardian honestly discharged his duties and finally accounted fully and satisfactorily. 129 Ind. 412.

<sup>2</sup> § 374. *E. g.*, the payment of interest on sums not invested, losses of money by bad investment or other fault, and culpable failure to collect debts or other delinquency; also the proper allowance for maintenance and education of infants. As the guardian is allowed his costs and expenses in suits on the ward's behalf, so he may charge bills of professional counsel properly paid; and this too when the charge was fairly occasioned by a contest over his accounts, which he defended; but he cannot make the estate pay for advice and services rendered on his own account under any colorable pretext. *McElhenny's Appeal*, 46 Penn. St. 347; 40 Ala. 498; 65 N. C. 265; *Blake v. Pegram*, 101 Mass. 592; 4 Redf. (N. Y.) 360; *Moore v. Shields*, 69 N. C. 50; 89 Cal. 636. The rule in some States is strict that a guardian who is a counsellor cannot charge for professional services rendered by himself. *Morgan v. Hannas*, 49 N. Y. 667

so as to hold guardians accountable on the usual footing of trustees. The citation to render account in the probate court is a summary proceeding, resembling the bill in chancery for discovery.<sup>1</sup>

(rule strict). Where the accounts have become complex and intricate through the guardian's own fault, the cost of stating them correctly ought not to be charged to the ward. 150 Ill. 466. And the primary liability for such attorneys as he employs is of course his own. §§ 344, 346. Interest has been allowed on sums of money necessarily advanced by him to his ward; and he is to be reimbursed for all reasonable and proper expenses incurred by him in the management of his ward's estate; also for his proper advances. 13 Pick. (Mass.) 272; 152 Mass. 328; 60 Iowa, 434. As to charging for supplies or special service, see *Morgan v. Hannas*, 49 N. Y. 667; *Moore v. Shields*, 69 N. C. 50; 42 Ala. 338; 109 Mass. 252 (insane ward); *Merkell's Estate*, 154 Penn. St. 285. As to the guardian's own charges for the maintenance of wards, there can be no question that he is neither obliged as such to maintain his wards at his own expense, nor justified in appropriating their earnings to himself. But there may be mutual offsets or a *quasi* parental relation. See 133 Mass. 531 (no right to sue ward where guardian has no property in possession to reimburse). Intention, on the guardian's part, to maintain the ward gratuitously may be inferred from circumstances; and yet there should be mutuality in all contracts. § 374; 39 Miss. 442. Equity disinclines to charge for a ward's maintenance for the benefit of the guardian's general creditors. 22 Gratt. (Va.) 73. Or to allow the guardian for supporting the ward before his appointment, except under strong circumstances. *Olsen v. Thompson*, 77 Wis. 666. Trumped-up claims of maintenance are of course disallowed. 85 Cal. 98; 86 Wis. 99. Like principles are applicable to demands against the guardian for his ward's services. 2 Sneed (Tenn.), 520; *Calhoun v. Calhoun*, 41 Ala. 369; 1 S. C. n. s. 337; 12 Gratt. (Va.) 608. See *Cummins v. Cummins*, 29 Ill. 452 (removal to another State); 16 Gray (Mass.), 404; *supra*, c. 5. It should be borne in mind that the guardian is not to subject his ward's estate to his own advantage, nor to go outside the line of duty. A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, without obtaining leave of the court, is liable. *Shaw v. Coble*, 63 N. C. 377.

<sup>1</sup> § 374. The guardian may correct mistakes, but not dispute his ward's rights at pleasure. *Steele Re*, 65 Ill. 322. See 40 N. J. Eq. 181. He is presumably liable to his ward for the nominal amount of debts due to the ward's estate which he has failed to collect; but he may show a failure without his fault. *Seigler v. Seigler*, 7 S. C. 317. He may be charged by the court with the amount lost by a culpably bad investment. *Kimball v. Perkins*, 130 Mass. 141. He is liable not only for what he actually



391. As to the compensation of guardians, the English rule is to treat all such fiduciary services as honorary and gratuitous.<sup>1</sup> But in this country compensation is allowed the guardian, or other fiduciary, while the court fees are usually trifling in comparison.<sup>2</sup>

392. For default and misconduct of the guardian the proper remedy is by suit on the probate bond.<sup>3</sup> In most States the guardian's bond cannot be sued until he has been summoned before the proper court to account; nor until leave of that court has been first obtained; except in certain cases of debts which appear of record.<sup>4</sup>

receives, but what he ought to receive. *State v. Womack*, 72 N. C. 397; *Stothoff v. Reed*, 32 N. J. Eq. 218; 50 Ala. 297; *Hutton v. Williams*, 60 Ala. 133; 127 Ind. 451. On the other hand, the ward's estate is subject to all liabilities properly incurred in the course of the guardian's honest and judicious management of it. *Owens v. Mitchell*, 38 Tex. 588; 57 Ark. 190. Honest errors may be corrected. 85 Ga. 542; 43 Kan. 175; 57 Ark. 304.

<sup>1</sup> § 375. Otherwise as to receivers and other officers of the court.

<sup>2</sup> Schouler, *Ex'rs*, Part VII.; 2 *Wms. Ex'rs*, 1682-1685. In some parts of this country custom or the local law establishes a commission as the guardian's compensation. In others the statute allows what the court may deem just and reasonable. The commission allowed the guardian has varied, according to different decisions and under special circumstances, all the way from one to ten per cent, which last is considered the usual maximum. See § 375 and local decisions cited. Guardians, executors or administrators, and trustees come under a like local rule. The expense of a clerk or collector is allowed in certain cases. See 2 *Paige* (N. Y.), 287; 29 Ga. 82; 29 Me. 504; 40 Ala. 498; 33 Ill. 212. See further, *Blake v. Pegram*, 101 Mass. 592 (no double commissions to guardian and trustee); 50 Ala. 297; 52 Tex. 84; 46 Vt. 673; 109 Mass. 252 (change of investments); 103 Penn. St. 139.

<sup>3</sup> Such suits are brought in the name of the judge, or the State, according to the requirements of statute, for the benefit of the person or persons injured. § 376; 23 Ind. 607; 37 Miss. 588.

<sup>4</sup> § 376 and local cases cited; 78 Me. 24; 21 Neb. 534; 3 Hill (N. Y.), 77; 42 Iowa, 643; 53 Cal. 16; 64 Ala. 399; 42 N. J. L. 15. But a guardian cannot prevent an action on his bond by failure to account. *Wann v. People*, 57 Ill. 202. As for chancery bill of account, in case of *quasi* guardianship, see next c. And see 87 Ill. 54. The balances due from the guardian and the extent of his liability cannot be precisely ascertained until the accounts are presented; moreover, his failure to account in obedience to judicial mandate, or to turn over the property according to

**393.** As to sureties of a guardian, they may sometimes be sued without a previous suit against the principal.<sup>1</sup> But here, again, in the absence of an accounting or a delinquency fixed in the proper court, suit cannot usually be maintained.<sup>2</sup> To all suits on guardians' bonds there is a limitation prescribed by law.<sup>3</sup> Sureties, as well as the guardian, are concluded, in the absence of fraud or palpable error, by the amount deliberately adjudged due from the guardian on settlement of his accounts, usually in a probate court.<sup>4</sup>

a balance shown on such accounting, fixes the delinquency. While, too, the guardian may sue his ward, after the latter attains majority, when it appears that the final indebtedness is in his own favor, he must wait until the court has ascertained and decreed its amount. 2 N. H. 395; 21 Penn. St. 337. For exceptions to rule, cf. 27 Gratt. (Va.) 651; 142 N. Y. 545; 55 Iowa, 110. See 103 Ill. 142. But an accounting is usually a prerequisite to suit on the bond. In an action on a guardian's bond the writ should be indorsed with the name of the person for whose benefit suit is brought. 14 R. I. 291. And see 91 Mich. 490; 92 Ala. 545; 127 Ind. 451.

<sup>1</sup> In a suit by the ward against his guardian and the sureties on the bond, a decree may be rendered at once against all. *Barnes v. Trafton*, 80 Va. 524; 1 Met. (Ky.) 22. The personal representative of a deceased insolvent guardian is not a necessary party to the ward's suit in equity against a surety. 77 Ala. 496. See 106 Ind. 251; 87 Ind. 102.

<sup>2</sup> § 377; 71 Ga. 49. And see *Douglass v. Ferris*, 138 N. Y. 193; *Parr v. State*, 71 Md. 220 (fraudulent settlement).

<sup>3</sup> 9 Cush. (Mass.) 68; 17 Ohio St. 548; 15 Ind. 104. Where no special period is fixed by law, the ordinary limitation to suits on sealed instruments must be held to apply. 10 Ga. 65; *Woodbury v. Hammond*, 54 Me. 332. As to when the limitation begins to run, cf. 54 Md. 332; 51 Vt. 82; 14 S. C. 488.

<sup>4</sup> 37 Penn. St. 60; 57 N. H. 450; 44 Ohio St. 339; 109 Ill. 294; 39 Ark. 145. Otherwise, however, in numerous late instances, where the sureties were not parties to the accounting. 43 Conn. 67; 53 Miss. 626; 71 Ind. 32; 81 Ind. 62; 76 Va. 731; *State v. Hoster*, 61 Mo. 544; *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249. And see 96 N. C. 34; 71 Ind. 32; 106 Ind. 251.

Whether made parties to an accounting or not, see 36 Vt. 297; 1 Pick. (Mass.) 198; 80 Ind. 597; 19 Fla. 373; 59 N. H. 547. Sureties compelled to respond in damages for the default of their guardian may seek indemnity from his property and subrogation. 10 Lea (Tenn.), 367; 53 Ark. 303. And see 20 S. C. 412. Equity also allows them to enforce contribution as among themselves. 36 Penn. St. 442; 25 Ala. 544. *Aliter* as to the ward's property. A surety may always take security from

## CHAPTER IX.

### RIGHTS AND LIABILITIES OF THE WARD.

**394.** A distinction is to be drawn between infant wards, and insane persons or spendthrifts under guardianship. As to the former, the law recognizes a growing responsibility, as it were, on their part; a postponement of many rights and duties to the period of maturity, but not utter and total suspension or loss.<sup>1</sup> Hence is that principle of election so constantly asserted at law on a ward's behalf; hence, too, the right he exercises, when of age, of passing in review old accounts to ascertain the balance justly due him. But as to insane persons and spendthrifts, their responsibilities are for the time blotted out; the disability may be temporary or it may be permanent; but while it lasts, it is complete.<sup>2</sup>

**395.** Many authorities allow an infant to sue his guardian by next friend for a tort.<sup>3</sup> The guardian may in all cases be held criminally responsible for an injury committed.<sup>4</sup>

his principal for his own indemnity, and, if default occurs, reimburse himself from the principal's own property like any other creditor. 9 Bosw. (N. Y.) 232; *Foster v. Bisland*, 23 Miss. 296; 22 Ark. 274; 2 Cold. (Tenn.) 104. But cf. 70 Ga. 454. As to impeaching a surety's fraud, see 70 Md. 253. In a suit against sureties on a guardianship bond, if one of the sureties is dead, his personal representatives should be joined. 39 Ill. 14. And see 57 Ala. 579; 47 Ind. 810; 68 Ill. 193; 117 Ill. 152; 91 Ky. 422.

<sup>1</sup> §§ 378, 379. And see *post*, Part V. c. 5.

<sup>2</sup> See as to the contracts, &c., of an insane person, § 380 and cases cited.

<sup>3</sup> § 381. His remedy may be found in getting the guardian removed for misconduct and securing the appointment of a successor, or perhaps obtaining his discharge from guardianship altogether. An action can then be brought by himself or the new guardian, as the case may be.

<sup>4</sup> 19 Pick. (Mass.) 506 (assault and battery); 76 Mo. 215; *Brittain v. Cannady*, 96 Ind. 266 (corrupting ward's virtue). As to an insane ward, see 89 Ga. 656. As to waste by the guardian, see 1 Ired. Eq. (N. C.)

**396.** Whenever guardianship has been terminated, an action of account lies in favor of the ward. And this action is brought by the new guardian, or by next friend; or by the ward himself, if the period of his legal disability has expired. While his guardianship continues, chancery permits the ward by next friend to file his bill against the guardian for account.<sup>1</sup> The ward's right to call his guardian to account may be barred by limitation, computed from the time he becomes competent to act.<sup>2</sup>

337; 6 Leigh (Va.), 399. And see *Porter v. Bleiler*, 17 Barb. (N. Y.) 149; *Senseman's Appeal*, 21 Penn. St. 331; *Sawyer v. Knowles*, 33 Me. 208; 14 Ala. 447; 103 Ind. 257 (statute). Cf. 89 Ga. 656; 76 Ga. 420. As to trespass, see 8 Cow. (N. Y.) 304; 8 Beav. 250. In general it is so desirable to deprive the guardian of all possession and control of his ward's estate, when the ward has a civil grievance against him (*e. g.* money had and received), that the latter's suit in damages ought to be at least accompanied by proceedings for removal of the guardian from his trust. See 52 Minn. 386. For a tort committed upon a third person by the ward, see 95 Ind. 598.

<sup>1</sup> § 382. All this seems to apply rather to chancery than probate guardians; since direct proceedings for account in the court which issued letters of guardianship, followed by removal of the guardian, if unfaithful, and suit on his probate bond, afford the infant under such guardianship an ample and expeditious remedy. But for chancery guardians, purely testamentary guardians, and *quasi* guardians, and under peculiar circumstances, the more expensive and complicated process of a bill in equity becomes the necessary resort. And this in England is still the usual course of procedure, while in most parts of the United States it has gradually gone out of use or has been superseded in great measure altogether. § 382; 5 Johns. Ch. 283; *Lemon v. Hansbarger*, 6 Gratt. (Va.) 301; 61 Ga. 137; *Macphers. Inf.* 259, 348; 3 Pick. (Mass.) 424; *Corbitt v. Carroll*, 50 Ala. 315; 27 Gratt. (Va.) 651. See *Black v. Kaiser*, 91 Ky. 422; 92 Tenn. 459. Equity in peculiar and complicated cases, where the probate jurisdiction appears inadequate, will apply its remedies on the adult ward's application. *Camp Re*, 126 N. Y. 377; *Pickering v. De Rochemont*, 45 N. H. 67.

<sup>2</sup> § 382. Cf. 27 Penn. St. 492; 59 Ga. 793; 34 Ill. 112; 176 N. Y. 591 (six years). In most States the general subject of limitation in all trusts is expressly regulated by statute. No statute of limitations begins to run before the ward's legal disability actually ends. 92 Tenn. 459. And peculiar circumstances will require equity to extend the period. 126 N. Y. 377; 93 Mich. 263; 17 Fla. 144. One who has been under probate guardianship is chargeable with constructive notice of the probate papers

**397.** State practice concedes often a choice of remedies to the ward even where probate intervention is proper for compelling an account in court.<sup>1</sup>

**398.** The ward is aided in recovering property embezzled, concealed, or conveyed away in fraud of his rights. The proper mode of procedure is by bill in equity.<sup>2</sup>

**399.** Fraudulent transactions cannot stand as against the ward; and in cases of this sort, equity will go to the substance rather than the form, in order to ascertain the real motives of one who transgresses, and justice will be done if possible.<sup>3</sup>

**400.** Various transactions of the guardian are subject to the ward's own disaffirmance on reaching majority; and herein consists the infant's right of election. The general rule of election recognizes two principles: (1) the privilege of the

and proceedings, and should prosecute his rights seasonably. *Robert v. Morrin*, 27 Mich. 306. No action by the ward lies at law for moneys in the guardian's hands until his accounts have been settled in court. 62 Wis. 248; 144 Mass. 195; *Thorndike v. Hinckley*, 155 Mass. 263. And see 65 Cal. 429. Cf. 82 Mo. 57; 88 Ill. 494; § 389.

<sup>1</sup> Thus the guardian's failure to settle and pay over within a reasonable time has been considered of itself a breach of the condition of the probate bond, entitling the ward to sue it at once. *People v. Seelye*, 146 Ill. 189. And see *Cobb v. Kempton*, 154 Mass. 266; 125 Ind. 519. In short, the general theory is, that on the infant ward's attainment of majority the guardianship over him *ipso facto* terminates; only that for convenient purposes beneficial to him a judicial supervision and control is exercised for bringing about a business-like adjustment of the late concerns of his wardship.

<sup>2</sup> § 383; *Hill v. McIntire*, 39 N. H. 410. And see as to summary statute process, 11 Gray (Mass.), 210; 16 Col. 75.

<sup>3</sup> § 384; 1 Ired. Eq. (N. C.) 342; *Lemley v. Atwood*, 65 N. C. 46 (transfer by guardian to his private creditors); 5 Paige (N. Y.), 644; 1 Cold. (Tenn.) 572; 22 Iowa, 427. So as to the ward's land. 1 Bush (Ky.), 533. See 44 Ill. 455. But in all cases of this sort, third parties should have some notice, actual or constructive, of the existence of a trust; otherwise they cannot be made to suffer loss further than the usual rules of stolen property apply. 3 Ired. Eq. 432. In any strong case of an illegal sale of the ward's property and its conversion, a ward has not only his remedy upon the guardian's bond, but can repudiate the sale and recover his property. *State v. Murray*, 24 Md. 310. See *infra*, § 386. But fraud is a question of evidence. 4 Jones, Eq. (N. C.) 395.

infant ward, on attaining full age, to avoid his guardian's doubtful transaction; (2) the right of courts of equity to control this privilege by interposing to pronounce the transaction good.<sup>1</sup> But as to transactions which involve the purchase or sale of real estate on the infant ward's behalf, the rule is very strict, as we have already seen.<sup>2</sup>

**401.** All advantageous bargains which a guardian makes with the ward's funds are also considered subject to the ward's election, either to repudiate or to uphold the contract and take the profits.<sup>3</sup> If the ward does not ratify an unauthorized

<sup>1</sup> § 385. The whole doctrine seems in strict accordance with that more general rule, that the accounts of the guardian are open to the inspection of the ward at majority, and may be disputed down to the smallest item. And where, as in the case of our probate guardians, settlements out of court do not dispense with final returns for preservation and public record, the tendency must be in favor of bringing the question of affirmance or disaffirmance of the guardian's transaction before the court, instead of leaving it to acts of the late ward *in pais*. These principles suffice for general application to compromises, submissions to arbitration, investments and reinvestments of personal property, and similar transactions, undertaken by the guardian either on the strength of a previous order of court, or at the risk of its subsequent approval. 1 Pick. (Mass.) 221. See *supra*, cs. 6, 8. Statutes sometimes interpose to render such transactions perfect on permission of the court. And see *Loehr v. Colborn*, 92 Ind. 24. Infants, as we shall see elsewhere, are incapable of assenting during infancy to anything prejudicial to their property interests. Part V. cs. 2, 3.

<sup>2</sup> 68 Ill. 190 (exchange); *Eckford v. De Kay*, 8 Paige (N. Y.), 89; *ante*, c. 7. See further, 3 Bush (Ky.), 87; *Holbrook v. Brooks*, 33 Conn. 347; *Summers v. Howard*, 33 Ark. 490; 59 Mo. 422; *Loyd v. Malone*, 23 Ill. 43; 88 N. C. 138 (contract to purchase). The right of election goes to the ward's personal representatives if he dies under age. 1 Head (Tenn.), 357; *Dean v. Feeley*, 66 Ga. 273. See 75 N. C. 540; 56 Tex. 17; 54 Tex. 206. And see, more generally, *post*, Part V. c. 5; 63 Ind. 129.

See as to a resulting trust in lands, *Hamnett's Appeal*, 72 Penn. St. 337; 17 Fla. 144; 33 Ark. 490; 54 Ga. 690; *Whitehead v. Jones*, 56 Ala. 152; *Patterson v. Booth*, 103 Mo. 422; *Fogler v. Buck*, 66 Me. 205.

<sup>3</sup> § 386. This applies, in general, to improper acts; as where the guardian speculates with the trust funds, or invests them in his own business, or, in a word, converts them to his own use. The ward may either take the investment as he finds it, with all the profits, or demand the original fund, with interest. 17 Ala. 306; 2 M. & K. 664; 8 Barb. (N. Y.) 48; 45 Ala. 161. Where the ward has declined to elect, the

investment, neither purity of intention nor diligence and good faith in endeavoring to prevent loss thereby will absolve the guardian from liability therefor.<sup>1</sup> A ward who repudiates a transaction to the disadvantage of some *bona fide* third person, ought in justice to offer to restore the consideration as far as he is able.<sup>2</sup>

402. In general, transactions between the guardian and ward from which the former derives an undue benefit will be court may make the election for him. *Seguin's Appeal*, 103 Penn. St. 139. See 3 Tenn. Ch. 651; 53 Mich. 329; 117 Ill. 152. Many acts of a trustee, which might once have been considered fraudulent and void, are now deemed voidable only. *Cassedy v. Casey*, 58 Iowa, 326. See 61 Miss. 766 (a joint purchase); 47 Minn. 118; *Doe v. Hassell*, 68 N. C. 213; *Chorpenning's Appeal*, 32 Penn. St. 315; 16 Lea, 732. Where the circumstances show fraud and collusion, courts of equity hesitate little in setting the transaction aside. 19 Pick. (Mass.) 272; *Winter v. Truax*, 87 Mich. 324. In general, if with the ward's funds the guardian purchases land and takes title to himself, a subsequent purchaser's rights should depend upon his good faith and the question whether he had due notice of the ward's title. See § 386; 2 Gray (Mass.), 141; 55 Mich. 482; 55 Miss. 71; 70 Ind. 9; 63 Md. 129; 26 Minn. 487; 83 Ind. 266. And see 71 Ala. 240; 54 Vt. 142 (sale of guardian's property to the ward); 49 Minn. 438.

<sup>1</sup> *May v. Duke*, 61 Ala. 53. But, in general, the guardian may discharge himself by turning over what securities and property he has taken in good faith and in the rightful exercise of his trust, if it remains as the result of prudent management of the estate on his part, whether valuable or worthless at the time of final settlement; his liability extending to property of the ward which has come to his actual or potential control. *Supra*, c. 6; *State v. Foy*, 71 N. C. 527. Cf. *Pierce v. Prescott*, 128 Mass. 140; *Burwell v. Burwell*, 78 Va. 574; 83 Mo. 60. See *State v. Greensdale*, 106 Ind. 364.

In equity the ward may follow not only money belonging to him which has been invested in land by his guardian, but any specific chattel purchased with his funds, into which his funds can be clearly traced, even though the guardian took title to himself. If, however, the ward elects to take the money, such property vests absolutely in the guardian, and those standing upon the guardian's title. 11 Bush (Ky.), 663. See *Branch v. De Bose*, 55 Ga. 21; 82 Ind. 388. And unless the fund can be traced into some specific thing or be clearly identified, the ward, of course, cannot assert his right therein, especially as to *bona fide* third parties who may have meantime acquired title. *Vason v. Bell*, 53 Ga. 416.

<sup>2</sup> § 386; *Myrick v. Jacks*, 39 Ark. 293; 100 Ind. 113; Part V. c. 5.

relieved against; but if an improper advantage has been taken, the ground for relief is still stronger.<sup>1</sup>

**403.** Suspicion here arises about the time the ward attains majority, and pending the final settlement of the guardian's accounts.<sup>2</sup>

<sup>1</sup> § 387; Story, Eq. Juris. § 807. A guardian is not presumably influenced by that affection for his ward which parents entertain towards their own offspring, and therefore has no such powerful check upon his selfish feelings. 1 Ves. 380; 2 Ves. 547; 9 Ves. 296. Cf. *Clark v. Van Court*, 100 Ind. 113; § 404.

<sup>2</sup> § 388. Lord Eldon in 9 Ves. 296; 18 Ves. 120; 3 M. & K. 135; Macphers. Inf. 260-264. And thus is it as to other transactions whereby the guardian secures an unfair advantage. The English rule is very strict, and gifts and conveyances of the ward's property, at this critical period, in consideration of the guardian's services, on a final adjustment, may be set aside afterward in equity, even after the ward's death.

In this country the rule is somewhat different; for certain circumstances, such as public recognition that compensation of some sort is justly due a trustee for his services, may fairly contribute to relax the rule in the guardian's favor. Settlements and bargains, gifts and conveyances out of court are, however, frequently set aside for undue influence. 2 Heisk. (Tenn.) 82; *Eberts v. Eberts*, 55 Penn. St. 110; 28 Miss. 737; 4 Barb. (N. Y.) 416; 6 Ga. 419; 7 B. Monr. (Ky.) 571. And see 33 Ill. 212 (gift of guardian); 4 Rich. (S. C.) 5. Cf. *Hawkins's Appeal*, 32 Penn. St. 263; 6 Johns. Ch. (N. Y.) 242; 8 Md. 230; 3 Md. Ch. 411; *Meek v. Perry*, 36 Miss. 190; 11 Ala. 760. Burden is on guardian. 61 Miss. 307. The fact that settlements out of court are not generally regarded in this country as conclusive, inasmuch as the probate guardian must still file his accounts and submit his transactions to the court, is a great safeguard against fraud. *Hailey v. Bond*, 64 Ala. 399 (probate or chancery).

The chancery practice is to allow the ward a reasonable time, after attaining majority, usually one year, to reopen all accounts between himself and his guardian. *Van Horne Re*, 7 Paige (N. Y.), 46. Cf. as to receipt in full or formal release, 53 Ala. 127; *Cheever v. Congdon*, 34 Mich. 296. And where the ward has not inspected or has made a partial inspection only, without examining the vouchers, or acted without advice, or upon imperfect knowledge of the facts, so much the greater is his equity to relief. § 388; 1 Sim. & Stu. 502; 1 Sandf. Ch. (N. Y.) 399; *Womack v. Austin*, 1 S. C. n. s. 421.

But in probate guardianship, settlements out of court usually give way to settlements in court. *Marr's Appeal*, 78 Penn. St. 66; 46 Ind. 203, 206; 60 Mo. 284; 11 S. C. 565; *Gravett v. Malone*, 54 Ala. 19. A settlement out of court, so-called, without turning over the property is no settlement. 62 Ind. 26; *Line v. Lawder*, 122 Ind. 548; *Roth's*



**404.** Transactions shortly after the period of guardianship, between parties lately holding the relation of guardian and ward, especially if the ward still remains under the influence of a former guardian, may be interfered with or set aside upon the same principle of constructive fraud. Such transactions, when disadvantageous, are always to be regarded with suspicion.<sup>1</sup>

Estate, 150 Penn. St. 261. Final settlement with infant ward duly represented by a guardian *ad litem* is as binding, as a rule, as a similar one made with an adult. 57 Ala. 22. But no final settlement of a guardian's account, so as to operate against the ward's rights, can be made by the court while the relation of guardian continues. 57 Ala. 628. And see 79 Mo. 587. A final account formally passed upon, due notice and opportunity to the ward is not reopened, except upon very strong proof of fraud or error. § 338 and cases cited. These are matters largely of statute regulation. *Ib.* Among decisions which apply to transactions between guardian and ward the following may be cited: Kelchner v. Forney, 29 Penn. St. 47; Burnham v. Dalling, 3 C. E. Green (N. J.), 132; Higgins v. McClure, 7 Bush (Ky.), 379; Wardlaw v. Gray, 2 Hill, Ch. (S. C.) 644. See also Douglas v. State, 44 Ind. 67; Coleman v. Davies, 45 Ga. 489; 122 Ind. 548. For the effect of a ward's receipt, see § 338; 28 Penn. St. 376; 62 Ind. 26; 43 N. H. 465; 69 Me. 282 (married ward); 51 Ala. 196. Statutes are found which permit the ward at full age to waive his legal right to an account and join his guardian in asking the court for a discharge. 78 Penn. St. 66. A guardian's probate settlement will not be presumed to include damages sustained by the infant's estate through fraud or misconduct of the guardian. 44 N. J. L. 64.

The test of credit for expenditure in a guardian's accounts is not, however, what his ward wished but what was proper. 84 N. W. 936. "Parental services" not a proper charge. 64 N. J. Eq. 65.

Lapse of time, following an informal settlement made with a ward who had reached majority, will bar a suit for an account in chancery; and even in our probate guardianship the late ward's release and receipt in full may under such favorable circumstances be shown either in defence to a citation to settle accounts in court or as a voucher upon such settlement. 60 Miss. 509; 156 Penn. St. 368; *Ela v. Ela*, 84 Me. 423; 68 Ga. 741; 19 S. C. 560 (lapse of years). If the ward be dead, the guardian's settlement must be with the ward's executor or administrator; but even thus a probate guardian's settlement is usually subject to the court's revision upon his accounts.

<sup>1</sup> § 389. 14 Ves. 273; *Harris v. Carstarphen*, 69 N. C. 416; *Garvin v. Williams*, 50 Mo. 206; 12 Barb. (N. Y.) 84. So, in purchase by guardian. 1 Ired. Eq. 460; *Wickiser v. Cook*, 85 Ill. 68. Or in purchase by ward. *Sherry v. Sansberry*, 3 Ind. 320. But cf. *Cowan's Appeal*, 74 Penn.

**405.** No one can marry a ward of chancery without the court's express sanction, according to the English doctrine.<sup>1</sup>

St. 329; 71 Mo. 623; *Berkmeyer v. Kellerman*, 32 Ohio St. 239. In all such cases and wherever the late guardian has extended the influence of his former relation to procuring some undue advantage, equity may interfere and enjoin or charge him as trustee or compel him to make restitution; not always, however, in the sense that he is still a guardian. *People v. Seelye*, 146 Ill. 189. Cf. 46 N. J. Eq. 285. This principle applies to quasi guardians, even to parents. *Espey v. Luke*, 15 E. L. & Eq. 579.

But the late ward may still be barred by the lapse of time alone, or of time in connection with his own acts, from disaffirming in law or equity his own transactions or his guardian's unauthorized acts. § 390 and cases cited. See 64 N. C. 507; 45 Ala. 555. Where the late ward sets aside the transaction for undue influence he ought if possible to refund the money, if any, which he received by way of consideration. 85 Ill. 68. Cf. *Foley v. Mutual Life Co.*, 138 N. Y. 333; 70 Miss. 813; 154 Mass. 491.

<sup>1</sup> § 390 and cases cited; Story, Eq. Juris. §§ 1356-1361. Interference by injunction to prevent; or punishment by way of penalty, if the marriage takes place, with interference to compel a suitable settlement, are features of this peculiar jurisdiction. American courts are indisposed to act thus. But see 107 La. An. 614 (ward cannot compel accounting). But where property of a female ward is under the control of an American court of equity, and the husband needs its assistance, a suitable provision might be compelled on her behalf; for this would be in accordance with the general law of husband and wife. § 390; 4 Paige (N. Y.), 64; *Van Deusen v. Van Deusen*, 6 Paige (N. Y.), 366. Guardian of a ward imprudently married without his assent permitted to bring a bill in equity for procuring the settlement of the ward's moderate fortune upon her, against her husband's wishes. *Murphy v. Green*, 58 Tenn. 403. Trusts for children are sometimes made with a proviso as to the child's marrying with the approbation of the trustee or testamentary guardian. See *Tweedale v. Tweedale*, 7 Ch. D. 633. See further, 33 Ch. D. 482; 25 Ch. D. 482. No jurisdiction lies to compel an infant ward of court to make settlement of his own property because of his marriage without leave. 40 Ch. D. 290.

## PART V.

### INFANCY.

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#### CHAPTER I.

##### THE GENERAL DISABILITIES OF INFANTS.

406. All persons are infants, in legal contemplation, until they have arrived at majority. The period of majority differs in different States and countries; but this general principle remains the same.<sup>1</sup>

407. The principle of an enlarging capacity in infants has been incidentally noticed.<sup>2</sup> But not until attaining majority could a person at the common law convey, lease, or make contracts in general which would bind him; and the foregoing must then be considered as raising exceptions to the rule that persons are legally incapable so long as they are minors.<sup>3</sup>

<sup>1</sup> § 391. Majority was reached at 25 under the civil law and this rule still applies in some European countries. 1 Bl. Com. 464. The common law of England has fixed 21 as the period of absolute majority for both sexes; but in the United States the rule is not wholly uniform in this respect, and in some jurisdictions females are deemed of age at 18. For the precise rule applied in the courts (beginning of the day preceding 21) see 1 Salk. 44; § 391.

<sup>2</sup> Hence we find that infants of suitable age are allowed to contract a valid marriage; that males of the age of fourteen and upwards, and females at the age of twelve, could once dispose of personal estate by will, and at fourteen may still choose or nominate their own guardians; that children of discretion have a voice in determining the right of custody and control.

<sup>3</sup> § 392; Co. Litt. 78 b, 89 b and Harg. note. As to the privilege of wills, see *post*, § 397. Legislative or judicial emancipation has existed in Louisiana and some other parts of this country once under the dominion of continental Europe. 12 La. An. 155; *Gordon v. Gilfoil*, 99 U. S. 168. See also 65 Mo. 349; 30 La. An. § 533; 54 Ark. 627; 25 Fla.

**408.** If a conflict of laws arises by reason of the period of majority being differently assigned by the law of the domicile of an infant's origin and that of his actual domicile, or of the situation of real property, or of the place where he has entered into a contract, certain rules will apply.<sup>1</sup>

**409.** As to the infant's right of holding office, the modern doctrine seems to be clear that no office of pecuniary and public responsibility can be conferred upon an infant; not so much because of mental incapacity on his part, as for the very good reason that a person who is not legally responsible for the duties of his office cannot be, in point of law, a proper person to execute them.<sup>2</sup>

**410.** Infants are responsible for crime who have arrived at sufficient maturity in years and understanding. The period of life at which a capacity of crime exists is determined by law to a certain extent; for a child under seven is conclusively incapable of crime, one between seven and fourteen only *prima facie* so, and one over fourteen *prima facie* capable like any other.<sup>3</sup> Where a statute creates an offence, infants under the

598. As to "emancipation" of a minor in our usual sense, see *ante*, 280. But such a right seems never to have been distinctly admitted at the common law in any such extensive sense.

<sup>1</sup> § 393. (1) Actual domicile preferred to that of birth; (2) *lex situs* of real estate prevails; (3) law of place of contract prevails; (4) law of forum may prevail as to remedies. *Ib.* and citations. See 65 Mo. 349; 56 Ark. 187, 349; 47 Mo. 105.

<sup>2</sup> § 394. Some old cases permitted certain English sinecure positions to be held by an infant as grantee, the duties being performed by a deputy. But the rule of our text is now regularly applied. See 5 B. & Ald. 81 (public office); 4 Russ. 372 (fiduciary position, administrator, bailiff, factor, &c.); 54 Ark. 235 (attorney at law); § 394.

As to an infant's right to serve a writ, cf. 109 N. C. 1; 2 M. & Ry. 306; 3 N. H. 408; 53 Vt. 109. Minors anciently sat in Parliament; but modern statutes, English and American, in constitutional provisions set limits even beyond majority before one can serve in certain high offices or serve as a legislator. § 394. Restrictions beyond majority upon the right of suffrage are also found. *Ib.* But as the fundamental discretion of a State is ample, infants are found permitted to enlist or hold military offices after reaching a certain suitable age. See 8 T. R. 578; 11 Pick. (Mass.) 265. And other special exceptions are found.

<sup>3</sup> § 395; 1 Bish. Crim. Law, § 460; 14 C. B. N. s. 535. Text-writers

age of legal capacity are not presumed to have been included ;<sup>1</sup> yet where an act is denounced as a crime, even felony or treason, it extends as well to infants, if above fourteen years, as to others.<sup>2</sup>

411. There are various criminal offences against young children set forth in our codes.<sup>3</sup>

have said that an infant can never plead constraint or compulsion of the parent, but this may be doubted. See 10 Allen (Mass.), 398; *State v. Learnard*, 41 Vt. 585; 104 Tenn. 501. But as to rape or similar crimes, where a child has not developed, see *State v. Handy*, 4 Harring. (Del.) 566; 8 C. & P. 736; 26 Ind. App. 437. But cf. *Wagoner v. State*, 5 Lea (Tenn.), 352. And see 61 Conn. 50; 14 Ohio, 222; 2 Pick. (Mass.) 390. The general rule is that capacity for crimes in persons above the age of seven years is a question of fact; the law assuming *prima facie* incapacity under fourteen, and capacity over fourteen; but subjecting that assumption of guilty intention to the effect of proof concerning the real fact. *State v. Learnard*, 41 Vt. 585; 13 Bush (Ky.), 230; *Martin v. State*, 90 Ala. 602; 15 S. C. 409; 76 Mo. 355. See *Dove v. State*, 37 Ark. 261; *Willis v. State*, 89 Ga. 188; 91 Ga. 15; *State v. Kluseman*, 53 Minn. 541.

<sup>1</sup> See 88 N. C. 650.

<sup>2</sup> 4 Bl. Com. 23; 1 Bish. Crim. Law, § 462. A child under fourteen may be within the fair scope of a particular statute misdemeanor. 101 N. Y. 195; 76 Me. 324; 112 Ga. 19; 77 N. Y. S. 892 (begging, &c.).

An infant may be indicted for obtaining goods by false pretences. 25 Wend. (N. Y.) 399. Or for stealing. 37 Ark. 261; 15 Q. B. D. 323. He is liable to bastardy process. 4 Met. (Ky.) 66. And, following the general principle already announced, children less than fourteen have been convicted for arson and murder or perjury, the *prima facie* presumption of incapacity being overcome. § 395; *State v. Barton*, 71 Mo. 288; *Martin v. State* (1891), Ala.; 13 Bush (Ky.), 230. But see 3 Hill (N. Y.), 479 (child less than seven). And it is reasonable to add that the evidence of malice or "mischievous discretion" which is to supply age ought to be strong and clear, beyond all doubt and contradiction. See 4 Bl. Com. 24; 81 N. Y. S. 254; 10 Allen (Mass.), 398; 28 Ind. 272; *State v. Tice*, 90 Mo. 112. As to recognizance, see 12 Kan. 463. As to injunction against infant, see (1899) 1 Ch. 343. Where a minor is imprisoned under an illegal sentence, the proper remedy is by *habeas corpus*, and not annulment of the sentence. *Cathing v. State*, 62 Ga. 243.

<sup>3</sup> § 396. Such as infanticide, cruelty to children (which certain societies seek to suppress), and corruption of morals. See 58 N. H. 475; 67 Ga. 29; 77 Mo. 103; 107 Ind. 483; 99 N. Y. 204; 61 Conn. 50. See as to infant prosecutor, 1 Head (Tenn.), 389.

As to an infant's presumed capacity to be diligent for his personal safety against peril, see §§ 396, 428.

**412.** Whether an infant may make a will is now determined by statute in England, and in most parts of the United States, and that determination is mostly unfavorable.<sup>1</sup>

**413.** Infants may be admitted to testify in the courts, if of sufficient understanding. There is no precise age at which the law excludes them on the conclusion that they are mentally and morally incompetent; but one's competency in any case will depend upon his actual intelligence, judgment, understanding, and ability to comprehend the nature and effect of a solemn statement under oath as distinguished from falsehood.<sup>2</sup>

<sup>1</sup> § 397. See English statutes, 1 Vict. c. 26 (1838); 20 & 21 Vict. c. 77; Schouler, Wills, §§ 39-43. But the old rule was otherwise, discriminating between real and personal property of an infant. See 2 Cas. temp. Lee, 529. This distinction still avails apparently to some extent in certain States. See § 397; Stimson, Am. Statute Law (Wills); Schouler, Wills, § 43.

<sup>2</sup> § 398; Greenl. Evid. § 363; 21 Me. 341. The usual presumption is favorable, where the infant is over fourteen, but unfavorable under that age. The judge at discretion makes preliminary examination to see whether the child understands the solemn obligation of an oath. See 11 Ind. 196; *Draper v. Draper*, 68 Ill. 17; *Vincent v. State*, 3 Heisk. (Tenn.) 120; 39 Tex. 129; *State v. Scanlan*, 58 Mo. 204. Of the capacity of such witnesses for comprehending the matter as to which they testify, of the strength of the memory, and in general as to the weight which may be attached to their testimony in any particular state of facts, a jury should make its estimate carefully. Competence to testify is not inconsistent with civil immunity at such an age for perjury. *Johnson v. State*, 61 Ga. 35; 47 Ga. 524.

Children have been admitted to testify at the early age of seven, and even of five. § 398; 10 Mass. 225; *Wade v. State*, 50 Ala. 164 (assault upon female child of eight). But cf. 3 Car. & P. 598. In cases where the intellect is sufficiently matured, and the education only has been neglected, it appears that a postponement of the trial might properly be asked. Per Pollock, C. B., *Regina v. Nicholas*, 2 Car. & K. 246; *Commonwealth v. Lynes*, 142 Mass. 577.

As to the deposition of an infant in chancery, see § 398; 2 P. Wms. 386, 403; 4 Sandf. Ch. (N. Y.) 37; 15 Ind. 332.

"Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanting in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive." 1 Phil. Evid. 9th ed. 6, 7. But

**414. An infant who becomes a party to a marriage settlement may repudiate it within a reasonable time after attaining majority.<sup>1</sup>**

**415. An infant may exercise a naked power, unaccompanied with any interest, and requiring no exercise of discretion; but herein is a strict limit.<sup>2</sup>**

where a young child's examination shows an utter want of anything like a knowledge of the nature or character and consequences of an oath, or of human relations to God and the Divine penalties denounced against false swearing, the child ought not to be allowed to testify. See *Beason v. State*, 72 Ala. 191; *State v. Belton*, 24 S. C. 185; § 398.

<sup>1</sup> § 399; *Edwards v. Carter* (1893), App. C. 360; (1893) 2 Ch. 307; 44 Ch. D. 211. But see English statute (1855) sanctioning such settlements to some extent. And see *Peachey, Mar. Settl.* 45; 33 Ch. D. 482. This subject has received little attention in the United States; notwithstanding the plenary jurisdiction over the estates and persons of infants which a court of equity is admitted to exercise in many of our States. But see 2 Paige (N. Y.), 511; 2 Sandf. Ch. (N. Y.) 153; 3 Md. Ch. 365; § 402; 18 Tex. 367. As to the parties who may object and repudiate, see 30 Barb. (N. Y.) 641; 3 Md. Ch. 365; *Davies v. Davies*, L. R. 9 Eq. 468; *White v. Cox*, 2 Ch. D. 387. And see as to marriage articles, *Brown v. Brown*, L. R. 2 Eq. 481; *Whichcote v. Lyle*, 28 Penn. St. 73.

<sup>2</sup> § 399 a; *Hill v. Clark*, 4 Lea (Tenn.), 405.

## CHAPTER II.

### ACTS VOID AND VOIDABLE.

**416.** Infants are favorites of the law, which extends its protection over them so as to preserve their true interests against their own improvidence, if need be, or the sinister designs of others. This principle is found constantly in chancery practice, and we have traced it already in general decisions.<sup>1</sup> Infancy in short is a personal privilege, allowed as a plea for protection against imposition. The general rule of the present day is that an infant shall be bound by no act which is not beneficial to him. And most acts and contracts of infants are divided into the two classes of void and voidable; a third class — namely, of binding acts and contracts — still remaining for separate consideration in our next chapter.<sup>2</sup>

**417.** On the subject of void and voidable acts and contracts there is much confusion in the books.<sup>3</sup> Where the contract

<sup>1</sup> § 416. See *e. g.* as to custody, guardianship, and emancipated minor's right to wages.

<sup>2</sup> § 400.

<sup>3</sup> See § 400, citing 3 Burr. 1794; Bing. Inf. 234, &c. And see 14 Mass. 457. The most approved test is that where the court can pronounce that the contract is for the benefit of the infant, as, for instance, for necessities, then it shall bind him; where it can pronounce it to be to his prejudice, it is void; and where it is of an uncertain nature, as to benefit or prejudice, it is voidable only, and it is in the election of the infant to affirm it or not. § 401; 2 H. Bl. 511; 1 Mason (U. S.), 82; 2 Kent, Com. 236. And see *Green v. Wilding*, 59 Iowa, 679; 16 Ohio St. 270. Contracts of an infant, caused by his necessities or manifestly for his advantage, are valid and binding, while those manifestly for his hurt are void. Contracts falling between these classes are voidable. *Philpot v. Bingham*, 55 Ala. 435. Parke, B., in *Williams v. Moor*, 11 M. & W. 256, 264, alludes to the uncertain sense of the word "void," as incapable of being enforced, or incapable of being ratified. Equity and the common law conform in the general doctrine. See Story, J., in 1 Mason (U. S.), 83; 1 Story, Eq. Juris. §§ 240, 241.



is voidable, not void, the infant has his election to avoid it either during his minority or within a reasonable time after he attains majority; otherwise, it is taken to have been confirmed, and so binds him forever, since he became capable, when an adult, of confirming it.<sup>1</sup>

**418. The privilege of avoiding acts or contracts is a privilege personal to the infant, which no one can exercise for him, except his heirs and legal representatives. Hence the adult contracting party in a voidable transaction remains bound, though the infant be not.<sup>2</sup> But third persons should be allowed to protect themselves against incurring undue liabilities on an infant's behalf.<sup>3</sup> And as a rule the right of avoidance, with due limitations of time and circumstances, passes to privies in blood entitled to the estate; in short, to the infant's heirs or his legal representative.**

<sup>1</sup> § 401.

<sup>2</sup> § 402; 1 Mason (U. S.), 83; 2 H. Bl. 511; *Harvey v. Briggs*, 68 Miss. 60; 12 Ind. 76; 5 Johns. (N. Y.) 160; 10 S. & R. (Penn.) 114. And see *Stiff v. Keith*, 143 Mass. 224 (minor as principal). So as to a promise to marry. *Warwick v. Cooper*, 5 Sneed (Tenn.), 659; *Rush v. Wick*, 31 Ohio St. 521. See further, 4 Esp. 187; 15 Mass. 273; *Hardy v. Waters*, 38 Me. 450; 14 Ind. 382; *Alsworth v. Cordtz*, 31 Miss. 32 (infant's purchase); 13 Mass. 237; 27 Conn. 424; 48 Fed. (U. S.) 810; 4 Sandf. (N. Y.) 374 (infant's conveyance); *Smith v. Railroad*, 91 Tenn. 221 (transfer of stock); *Monaghan v. Fire Ins. Co.*, 53 Mich. 238 (insurance contract). So, too, infancy does not protect the adult indorsers or sureties of an infant; or those who have jointly entered into his voidable undertakings. 5 Esp. 47; 5 Johns. (N. Y.) 160; *Taylor v. Dansby*, 42 Mich. 82; 117 Mass. 479; *Winchester v. Thayer*, 129 Mass. 129 (adult copartner). In fine, the defence of infancy is for the benefit and protection of the infant; and other persons may not set it up for their own benefit, at all events if the contract be not void. *Beardsley v. Hotchkiss*, 96 N. Y. 201 (marriage settlement).

<sup>3</sup> *Kinney v. Showdy*, 1 Hill, 544 (bid of infant at auction).

<sup>4</sup> 1 Redf. (N. Y.) 498; *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Veal v. Fortson*, 57 Tex. 482; 76 Ala. 343; *Harvey v. Briggs*, 68 Miss. 60; *Turpin v. Turpin*, 16 Ohio St. 270 (administrator); 8 Mo. 135; 23 N. J. 475 (beneficiary of infant's life insurance policy); 137 N. Y. 148; 165 Mo. 380 (heirs of deceased). Devisees under a will, as strangers privy in estate only, cannot avoid the infant's contract. *Bozeman v. Browning*, 31 Ark. 364.

419. The modern tendency regards the infant's acts and contracts as voidable rather than void;<sup>1</sup> and due repudiation at all events concludes sufficiently, whether the transaction be void or voidable.<sup>2</sup> Yet there are cases where a contract may still be pronounced wholly void.<sup>3</sup>

420. These cases of void transactions almost invariably proceed upon the doctrine that the infant's act was positively prejudicial to his interest; and certainly, if any contract can be so pronounced on mere inspection, it is a contract whereby an infant becomes bound upon another's debt or disability. The technical form of the transaction is of less importance.<sup>4</sup>

<sup>1</sup> Met. Contr. 40; 1 Met. (Mass.) 559.

<sup>2</sup> § 403; 4 Md. 435; 32 N. H. 345; 11 Humph. (Tenn.) 468; Babcock v. Doe, 8 Ind. 110; Irvine v. Irvine, 9 Wall. (U. S.) 617; Robinson v. Weeks, 56 Me. 102.

<sup>3</sup> Regina v. Lord, 12 Q. B. 757 (one-sided contract to work). Cf. 3 Q. B. D. 229. See Corn v. Matthews, (1893) 1 Q. B. 310 (unfair apprenticeship deed); 45 Ch. D. 430. But see [1892] 3 Ch. 502; Danville v. Amoskeag Co., 62 N. H. 133. A contract which sets a minor child working to pay off the creditor of some one else (even his own parent) should be pronounced prejudicial to his interest and void, when the wages that ought to be his own are thus appropriated. Dubé v. Beaudry, 150 Mass. 448 (contract, though fully executed during minority, repudiated). Any transfer of an infant's real or personal property which cannot possibly be for his benefit and is without consideration is void. Bloomington v. Chittenden, 74 Mich. 698; 90 Tenn. 705; Person v. Chase, 37 Vt. 647; 25 Iowa, 95. So an infant's bond with penalty, especially as surety, is void. 8 M. & S. 477; 8 East, 330; 4 Harring. (Del.) 99. But cf. Reed v. Lane, 61 Vt. 481. See also (mortgage as surety) 6 Mich. 217; 4 Md. Ch. 403; 23 W. Va. 100. And see 3 Gill & J. (Md.) 115 (release instead of receipt); 97 Penn. St. 202 (infant's stock speculation or wager); § 404. An infant's indorsement or guaranty or suretyship exposes him to a dangerous liability, and such acts are held void. Margrett *Ex parte*, [1891] 1 Q. B. 413 (and this, however valuable be the consideration). The construction of a local statute will in some cases determine. 53 Ill. 134.

<sup>4</sup> § 404; State v. Plaisted, 43 N. H. 413; 9 Vt. 368; 25 Barb. (N. Y.) 399; 1 Met. (Mass.) 559; Monumental Association v. Herman, 33 Md. 123; 1 Vroom (N. J.), 505; L. R. 10 Ch. 15.

As to statutory recognizance for himself, this may even be binding. See next chapter. And see Howard v. Simpkins, 70 Ga. 322; 20 Neb. 185. Yet there are many cases where an infant's bonds, mortgages, and promissory notes have been held not void, but under the

This we conceive to be the reasonable view of the subject: that the rule of voidable, rather than void, applies wherever the transaction was not from its very nature such as could be pronounced prejudicial to the infant's interest, but might under some conditions be in a sense for his personal benefit.<sup>1</sup>

**421. Letters of attorney from an infant conveying no present interest are held to be absolutely null.<sup>2</sup>** In this country there

circumstances of the case voidable only; as where given in ordinary transactions which may possibly prove beneficial with relation to the minor's property. Even an infant's contract as surety or indorser has lately been pronounced voidable and not void in numerous instances.

<sup>1</sup> § 404. But see the peculiar rule of *Zouch v. Parsons*, 3 Burr. 1804; making deeds which do not take effect by delivery of hand void, and deeds which do so take effect as voidable, if not valid. This seems rather an incident than a principle. See § 405. The real reason of such a rule might have been that solemn instruments and transactions of grave importance ought not to be lightly entered upon, or be made effective in future. An infant may make a voidable purchase and take a voidable conveyance of land; for, says Lord Coke clearly, "it is intended for his benefit." Co Litt. 2 b. See 17 Mo. 347; 15 Col. 236; *Spencer v. Carr*, 45 N. Y. 406; 9 Lea (Tenn.). 56; *Brendle v. Herron*, 88 N. C. 383. For this reason, rather than the technical one just referred to, it may be said in general that the conveyance of land by a minor is also voidable and not void. § 405; 75 Ill. 315; *Davis v. Dudley*, 70 Me. 236; *Weaver v. Carpenter*, 42 Iowa, 343; 57 Ala. 14; *Nathans v. Arkwright*, 66 Ga. 179; 83 Ind. 382; 60 Miss. 420; 64 Miss. 8; *Dawson v. Helmes*, 30 Minn. 107; *Bingham v. Barley*, 55 Tex. 281; 44 Ark. 153; *Birch v. Linton*, 78 Va. 584; *Haynes v. Bennett*, 53 Mich. 15. And so as to infant wife. 52 Ind. 68; 93 Ind. 423. Or infant husband. *Barker v. Wilson*, 4 Heisk. (Tenn.) 268; 12 Mo. 549. See comment in 3 Dru. & War. 340 (1842). An infant's conveyance of land without consideration and plainly to his prejudice is void. *Robinson v. Coulter*, 90 Tenn. 705.

So leases to infants are not absolutely void; but voidable only. *Griffith v. Schwenderman*, 27 Mo. 412; *Valentine v. Canali*, 24 Q. B. D. 166; *Flexner v. Dickerson*, 72 Ala. 318. Or an exchange of property. *Williams v. Brown*, 34 Me. 594. Or the infant's bond for title to real estate or his contract to convey. 24 Ala. 420; *Yeager v. Knight*, 60 Miss. 730; 32 Mich. 377. Or his contract for the purchase of land. *McCarty v. Woodstock Co.*, 92 Ala. 463.

<sup>2</sup> *Zouch v. Parsons*, 3 Burr. 1804; 1 H. Bl. 75; 4 Moore, 85, 719 (warrant of attorney). Otherwise where there is a probable benefit. § 406. See as to his appointing an agent, 64 N. E. 94; 99 Mo. App. 513 (void); 29 Ind. App. 181.

are decisions in some States to the same effect;<sup>1</sup> in others, again, the rule is deemed somewhat doubtful.<sup>2</sup> An infant cannot bind himself by *cognovit*.<sup>3</sup>

**422. Various miscellaneous acts and contracts of an infant are held voidable, rather than void.**<sup>4</sup>

<sup>1</sup> *Lawrence v. M'Arter*, 10 Ohio, 37; *Waples v. Hastings*, 3 Harring. (Del.) 403; 6 Cow. (N. Y.) 393; *Knox v. Flack*, 22 Penn. St. 337; *Wainwright v. Wilkinson*, 62 Md. 146.

<sup>2</sup> *Pickler v. State*, 18 Ind. 266. See also 24 Cal. 195; *McCarty v. Murray*, 3 Gray (Mass.), 578; *Kingman v. Perkins*, 105 Mass. 111; 38 Me. 450. The good sense of the rule seems to be that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done by virtue of it, as voidable only, in the same manner as his personal acts and contracts are considered. § 406; Met. Contr. 42. And, we may add, the English and most of the American decisions do not seem to carry the rule beyond cases of the technical "warrant of attorney," as in confessing judgment, except it be with reference to an infant's land, which power stands also upon a strong footing of objection. § 406; *Philpot v. Bingham*, 55 Ala. 435. What we call "powers of attorney" are less likely than the warrant of attorney to be to the infant's prejudice; though we may well assume that whatever an infant cannot do he cannot authorize another to do for him, so as to make the transaction more binding.

<sup>3</sup> *Oliver v. Woodroffe*, 4 M. & W. 653. See 11 M. & W. 256.

<sup>4</sup> § 407. His usurious contracts. 19 Wend. (N. Y.) 301. His release, compromise, or submission to arbitration. 1 Pick. (Mass.) 221; 6 Mass. 78; *Lansing v. Michigan R.*, 126 Mich. 663. Judgments against him. 43 Iowa, 213; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Walkenhorst v. Lewis*, 24 Kan. 420; 21 Neb. 680; 97 N. C. 21; 94 N. C. 732; *Montgomery v. Carlton*, 56 Tex. 361. His covenant to carry and deliver money. 16 Ala. 186. His chattel mortgage. *Miller v. Smith*, 26 Minn. 248; *Corey v. Burton*, 32 Mich. 30; 25 Fla. 185. His executory contracts generally. *Dillon v. Bowles*, 77 Mo. 603; *McCarthy v. Nicrosi*, 72 Ala. 332; *Drew v. Drew*, 40 N. J. Eq. 458; 33 Minn. 489; 12 Pick. (Mass.) 425; 10 Allen (Mass.), 161 (promise to pay); *Armitage v. Widoe*, 36 Mich. 124 (contract of purchase). A family arrangement or marriage settlement. *Turpin v. Turpin*, 16 Ohio St. 270; 46 Iowa, 466; § 399.

In so many cases discussed in this chapter is the infant before or at majority presented as seeking and being permitted to set aside the transaction, that the voidable rather than void nature of the transaction is assumed, rather than asserted, and the decision is more to the point that, void or voidable, it does not under the circumstances bind him. See *e. g.*, *Dubé v. Beaudry*, 150 Mass. 448; 12 Q. B. 759.

A minor's contract for stock or his transfer is voidable usually. In-

423. In general an infant cannot trade, and consequently cannot bind himself by any contract having relation to trade.<sup>1</sup> Yet, even in trading contracts, it must not be forgotten that the current of modern decisions is to make the transactions of an infant voidable and not void.<sup>2</sup>

*dianapolis Chair Co. v. Wilcox*, 59 Ind. 429; 91 Tenn. 221. Or if purely speculative and prejudicial to him it may be even void. *Ruchizky v. De Haven*, 97 Penn. St. 202. Cf. *Crummey v. Mills*, 40 Hun (N. Y.), 370. See also 3 Ex. 565; 5 Ex. 114; (1894) 3 Ch. 589; L. R. 8 Ch. 939.

An absolute gift of articles of personal property made by an infant can be revoked or avoided by him. *Person v. Chase*, 37 Vt. 647; 59 Me. 464; *Oxley v. Tryon*, 25 Iowa, 95; *Towle v. Dresser*, 73 Me. 252; *City Savings Bank v. Whittle*, 63 N. H. 587. And the executed contract of an infant follows the same rule as an executory one; he may rescind the one as well as the other; the more so, where the other party can be put substantially *in statu quo*. 5 S. & M. (Miss.) 216; *Robinson v. Weeks*, 56 Me. 102; 180 Mass. 140 (seller must refund without charge for use). See 94 N. C. 355. But if before rescission the adult makes a *bona fide* transfer of property purchased of the minor, trover will not lie against him. 6 Fost. (N. H.) 280; *Riley v. Mallory*, 33 Conn. 201. See also as to an executed agency, *Welch v. Welch*, 103 Mass. 562. As to a minor's life insurance contract and its warranty, see *O'Rourke v. Life Ins. Co.*, 23 R. I. 457; 184 Mass. 348 (agency).

<sup>1</sup> § 406; *Smith, Contr.* 278; 2 Esp. 480; 10 Bing. 252 (investment recovered); *Rex v. Wilson*, 5 Q. B. D. 28; 18 Ch. D. 109.

<sup>2</sup> 5 B. & Ald. 147. Nor is another principle to be lost sight of in trading contracts; namely, that fraudulent representations and acts, though made by an infant, may sometimes make his contract binding upon him, or at least afford a means of holding him answerable for the transaction. See §§ 424-426, *post*.

In this country it is admitted that, in point of fact, infants do sometimes trade, as partners or otherwise; but that, nevertheless, their trading contracts do not absolutely bind them, being voidable at their option and not absolutely void. 30 Iowa, 350; 129 Mass. 129; 35 Minn. 488; 13 Met. (Mass.) 306; *Kinnen v. Maxwell*, 66 N. C. 45. Aside from his affirmation on reaching majority, however, an infant partner is not liable individually for the firm debts beyond what he put into the business. *Bush v. Linthicum*, 59 Md. 344 (firm dissolved by proceedings in equity); *Jaques v. Sax*, 39 Iowa, 367; *Dunton v. Brown*, 31 Mich. 182; 70 Ind. 35; *Continental Bank v. Strauss*, 137 N. Y. 148 (adult partner cannot plead). And see 68 Miss. 529 (assignment of assets by adult co-partner); *Neal v. Berry*, 86 Me. 193 (note of firm).

In such arrangements, however, while the infant is protected, on the one hand, he is not on the other permitted to derive undue advantages

**424.** The difference between the void and the voidable contracts of an infant is simply, then, that the void contract is a mere nullity, of which any one can take advantage, and which is, in legal estimation, incapable of being ratified; while a voidable contract becomes at the option of the infant, though not otherwise, binding upon himself and all concerned with him. Acts or circumstances, therefore, which amount to a legal ratification, serve to make the voidable contract of an infant completely binding and perpetually effectual; and this period of ratification is usually, though not always, referred to the date when the disability of infancy ceases, and he becomes of full age.<sup>1</sup>

from his disability. 137 N. Y. 148; 148 Mass. 269; 50 Fed. (U. S.) 898; 11 Paige (N. Y.), 107; 31 Mich. 182; *Foot v. Graham*, 68 Miss. 529; 56 Hun, 475; *Neal v. Berry*, 86 Me. 193. As to firm assets obtained by any such firm contract, these should in justice be devoted to satisfying the liabilities incurred in procuring them, and the infant is not allowed to retain the partnership property nor to assert title to any portion of it, until the firm creditors are satisfied; he is thus likely to lose what he has put into the concern, if the firm prove insolvent, at the same time that he is not individually liable. *Pelletier v. Couture*, 148 Mass. 209; *Bush v. Linthicum*, 59 Md. 344; 92 Me. 463. On reaching majority an infant may by his acts keep an undissolved partnership continuing, and by his own acts and conduct commit himself fully to outstanding obligations. 33 S. C. 285; 2 Hill (S. C.), 479.

<sup>1</sup> § 409; 3 Lea (Tenn.), 292 (void conveyance). An infant's voidable conveyance of land, which is a solemn instrument, and perhaps his deeds generally, cannot be avoided or confirmed during his minority. 3 Burr. 1794; 17 Wend. (N. Y.) 119; 16 N. H. 385; 8 Tex. 80; *Sims v. Everhardt*, 102 U. S. 300; 7 R. I. 230; 83 Ind. 382; *Corey v. Burton*, 32 Mich. 30 (chattel mortgage). But as to many other transactions it is different, particularly where the contract relates to personal property, or is an unexecuted one: to perform services, to marry, or to hire or occupy, for instance, and relates to the minor's person. *Gregory v. Lee*, 64 Conn. 407; § 403. An infant's sale or exchange or purchase of personal property, or contract for such sale or exchange or purchase, may be rescinded by him at any time during minority; and when the transaction is thus avoided, the title to his property revests in the infant. § 409; 33 Md. 128; *Riley v. Mallory*, 33 Conn. 201; 27 Ind. 327; *Hoyt v. Wilkinson*, 57 Vt. 404; *McCarthy v. Henderson*, 138 Mass. 310; *Indianapolis Chair Co. v. Wilcox*, 59 Ind. 429. This distinction appears to be recognized out of regard to the infant's benefit; since land might be recovered after long lapse of

## CHAPTER III.

### ACTS BINDING UPON THE INFANT.

425. There are some acts and contracts which an infant ought to be able for his own good to perform and make; some acts and contracts of which it may be said that the privilege of standing upon a clear footing is worth more to him than the privilege of repudiation. These are recognized as exceptions to the general rule; they are neither void nor voidable, but are obligatory from the outset, and thus neither require nor admit of ratification on the infant's part. Again, there are acts and contracts which public policy makes obligatory.<sup>1</sup>

426. Contracts for necessities are the most important of these binding contracts.<sup>2</sup> Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessities; but we must construe these words in a relative sense, and somewhat according to the social position, fortune, prospects, age, circumstances, and general situation of the infant himself.<sup>3</sup>

time upon disturbing the possessor's title, while personal property would often be utterly lost if one could not trace out and recover it until he became of age. Furthermore it is easier thus to make restitution to the other party and place things *in statu quo*. To repudiate one's executed contract while yet an infant, so as to gain an unfair advantage, is not usually permitted; but the court requires one's decision to be postponed to mature age, or otherwise attempts justice by requiring such restitution as he is able to make. *Dunton v. Brown*, 31 Mich. 182. As to ratification or disaffirmance, see chapter 5. A statute provision is sometimes found. 45 Iowa, 57.

<sup>1</sup> § 410.

<sup>2</sup> § 411. Necessaries for a married woman may not be necessities for a child; nor are necessities for a young child the same as those for a child nearly of age.

<sup>3</sup> § 411; 1 Gray (Mass.), 458.

Articles of mere ornament are not necessities. Burden of proof lies

**427.** The dividing line between court and jury in such cases is not in this respect clearly marked, as the latest cases teach us.<sup>1</sup>

on plaintiff to establish as necessities things otherwise superfluous. *Peters v. Fleming*, 6 M. & W. 42; 1 Man. & Gr. 550; 7 Watts (Penn.), 239; 10 Vt. 225; *Ryder v. Wombwell*, L. R. 4 Exch. 32; *Welch v. Olmstead*, 90 Mich. 492 (watch and chain). See also L. R. 3 Ex. 93, n. (tobacco); *Dorrell v. Hastings*, 28 Ind. 478 (commutation from draft). Horses, saddles, bicycles, harness, and carriages may be necessities under some circumstances, but not ordinarily. 1 Man. & Gr. 550; 2 Humph. (Tenn.) 67; 11 Cush. (Mass.) 40; 2 Strobb. Eq. (S. C.) 289. And see as to wedding garments, 14 B. Monr. (Ky.) 232. But not college treats and suppers. 5 Q. B. 606; *Brooker v. Scott*, 11 M. & W. 67. Nor superfluities of dress. 15 Ark. 137. See as to uniforms. The uniform of an officer's servant is adjudged a necessary; but not cockades for his company. 8 T. R. 578; 5 Esp. 52. An insurance contract is not a necessary. *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345; *Union Life Ins. Co. v. Hilliard*, 63 Ohio St. 478.

<sup>1</sup> § 413; *Ryder v. Wombwell*, L. R. 4 Exch. 32. Cf. § 413; 19 Law Times, n. s. 398; *Johnstone v. Marks*, 19 Q. B. D. 509. A judge may strongly instruct a jury in a clear case. *Mohney v. Evans*, 51 Penn. St. 80. But the usual question is of mixed law and fact. § 413.

A college education is not a necessary, though a child's suitable ordinary education would be. 16 Vt. 683; *Kilgore v. Rich*, 83 Me. 305; § 413. As to repairs on buildings upon infant's real estate, see *Wallis v. Bardwell*, 126 Mass. 366; *Price v. Sanders*, 60 Ind. 310; *Phillips v. Lloyd*, 18 R. I. 99; 4 Jones Law (N. C.), 1; 78 Hun, 603 (dwelling house); 36 Neb. 51 (lien or incumbrance). And see 11 N. H. 51 (lawyer as to real estate).

Legal expenses of an infant may in a reasonable case be considered his necessities. *Munson v. Washband*, 31 Conn. 303; 5 Esp. 28; *Barker v. Hibbard*, 54 N. H. 539 (criminal proceedings); 74 Tex. 294; 17 C. B. n. s. 553 (marriage settlement); 81 Tex. 644; *Thrall v. Wright*, 38 Vt. 494; 34 N. Y. 555; § 413. Cf. *ante*, 66. The standard is not what the infant agreed to pay, but what is right and just.

An infant may contract for his necessary lodging, but he cannot bind himself for more. *Bradley v. Pratt*, 23 Vt. 378; 59 N. H. 354. Cf. 1 Scott, 458; 11 Cush. (Mass.) 40. Nor are articles for business or trade, whether agricultural, commercial, or mercantile, brought within the present rule. 41 Mo. App. 275; § 413. Yet, as to clothing, farm animals, supplies, &c., circumstances must be considered, and either quantity or quality may be regarded. See *Chapple v. Cooper*, 13 M. & W. 258 (gold filling and dentist's work upon teeth); *Strong v. Foote*, 42 Conn. 203; *Mohney v. Evans*, 51 Penn. St. 80; *Chapman v. Hughes*, 61 Miss. 339; § 413.



428. If the natural protector with whom the child lives does his legal duty as best he may according to his means or the infant's property available, this is a criterion.<sup>1</sup> An infant is not liable for necessities when he lives under the roof of his father, who provides everything which seems proper and fulfils his parental duty. And so when the infant is supplied by a guardian or widowed mother, or any one assuming the place of parent.<sup>2</sup> It is the province of the court to determine whether the articles sued for are within the class of necessities, and, if so, it is the proper duty of the jury to pass upon the questions of quantity, quality, and their adaptation to the condition and wants of the infant.<sup>3</sup> Generally, the question is one of fact for the jury, though the rule is not always applied with precision; and the two principal circumstances are, whether the articles are suitable to the minor's estate and

<sup>1</sup> *McKanna v. Merry*, 61 Ill. 177 (parent's or guardian's discretion); *Hoyt v. Casey*, 114 Mass. 397.

<sup>2</sup> § 413 and cases cited; 16 Mass. 28; 9 Johns. (N. Y.) 146. *Prima facie*, where the child resides at home, proper maintenance is furnished him. But an infant, when absent from home, and not under the care of his parent or guardian, is usually liable for his own necessities. 16 Mass. 28; *Hunt v. Thompson*, 3 Scam. 179. As to an emancipated infant, see *Genereux v. Sibley*, 18 R. I. 43. And the law will imply a promise, on the part of an infant having no legal protector, to make payment, at a reasonable price, for what were necessities. *Epperson v. Nugent*, 57 Miss. 45; *Parsons v. Keys*, 43 Tex. 557; 18 R. I. 43; *Morse v. Ely*, 154 Mass. 458. There is no inflexible rule of law, however, which makes it incumbent on the tradesman who supplies an infant to inquire. 7 Scott, 183. And the parent or guardian may sanction by words or conduct the child's purchase, so as to make it obligatory. 5 Bing. N. C. 198; 50 Barb. (N. Y.) 381; 42 Conn. 203.

As to an infant's purchase on credit, cf. *Burghart v. Hall*, 4 M. & W. 727; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; 18 Ga. 467; *Nichol v. Steger*, 6 Lea (Tenn.), 393. No suit in equity for necessities, but equity may compel the return of articles furnished. 28 Ga. 522; 6 Lea (Tenn.), 393. Infant sometimes bound by a purchase of necessities under authority of his guardian; but where credit is given to a parent or guardian, the infant's estate is not answerable. 7 Watts (Penn.), 344; 6 W. & S. 80; 18 Ill. 63; 148 N. Y. Super. 152.

<sup>3</sup> § 414; 6 M. & W. 42; 1 Man. & Gr. 550; 11 N. H. 51; *Beeler v. Young*, 1 Bibb (Ky.), 519.

condition, and whether he is, or is not, without other means of supply.<sup>1</sup>

**429.** An infant is liable at the suit of a person advancing money to a third party to pay for necessities furnished to the infant.<sup>2</sup> The liability of an infant on his deed, bond, or promissory note given for necessities is sometimes considered.<sup>3</sup>

**430.** Necessaries purely in futuro, or upon some executory contract of the infant, cannot charge him, for his liability only arises when the necessities are furnished.<sup>4</sup>

<sup>1</sup> 12 Cush. (Mass.) 512; 19 Q. B. D. 509; *Barnes v. Toye*, 13 Q. B. D. 410. An infant will be held to pay for necessities what they are reasonably worth, but not what he may foolishly have agreed to pay for them, and, whatever be the form of the contract, inquiry is made into their real value. *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keys*, 43 Tex. 557; *Wood v. Losey*, 50 Mich. 475 (burden of proof). It may be shown, when the infant is sued, not only that the articles were not of the kind called necessities, but that the infant at the time they were furnished was sufficiently provided with articles of that kind.

<sup>2</sup> 10 Cush. (Mass.) 436; *Randall v. Sweet*, 1 Denio (N. Y.), 460. As to money given the infant directly to be thus expended, cf. § 414; 12 Mod. 197. The equity rule is, that if money is lent to an infant to pay for necessities, and it is so applied, the infant becomes liable; for the lender stands in place of the payee. 1 P. Wms. 558; 2 Sandf. (N. Y.) 306; *Randall v. Sweet*, 1 Denio, 460; *Kilgore v. Rich*, 83 Me. 305; 2 Duv. (Ky.) 147 (innkeeper's lien). See also as to wife, *ante* 86.

<sup>3</sup> § 414. His bond for necessities with penal sum is considered void. See 10 Bing. 252; *ante*, 419. Otherwise his deed. § 414. The law as to his promissory note has been in confusion. But equity influences the later cases; that somewhat novel and yet manifestly just principle gaining ground that one who receives advantages is liable on an implied contract to furnish a suitable recompense. Hence it may be said that an infant is bound for necessities only on an implied contract to pay the amount of their value to him; and that whenever the instrument is such that the consideration may be inquired into, he is liable thereon for the true value of the articles for which it was given. § 414. *Earle v. Reed*, 10 Met. (Mass.) 387. Even a bond for necessities has been deemed binding where the statute allows its consideration to be impeached and a judgment *pro tanto* rendered for the amount actually due. *Guthrie v. Morris*, 22 Ark. 411. And see 3 N. H. 348; *Ray v. Tubbs*, 50 Vt. 688; 23 Vt. 378; *Price v. Sanders*, 60 Ind. 310. Cf. 87 Ind. 245 (promissory note). Yet the instrument given — *e. g.* deed, bond, &c. — may itself be void or voidable at law. See as to deed or mortgage for necessities, 81 Tex. 544 (but only the true consideration recovered).

<sup>4</sup> § 414 *a*; *Gregory v. Lee*, 64 Conn. 407. See further, *Hall v.*

**431.** Contracts which concern the marriage relation are also made obligatory upon the infant; being neither void nor voidable. Contracts of marriage are binding, if executed: they cannot be avoided on the ground of infancy,<sup>1</sup> except for the non-age barrier;<sup>2</sup> while on the other hand no such considerations of policy attach to an infant's promise to marry, and such promise is not binding.<sup>3</sup>

**432.** The acts of an infant that do not touch his interest, but which take effect from an authority which he is by law trusted to exercise, are binding.<sup>4</sup> This seems to arise from the consideration which the law pays to the rights of others besides the infant; or, to put it differently, the doctrine may rest upon this fact, that the infant in such cases does not act as an infant.<sup>5</sup>

**433.** As member of a corporation, and in relation to such property, an infant shareholder becomes usually bound.<sup>6</sup>

**434.** An infant will be bound by any act which the law would have compelled him to perform.<sup>7</sup>

Butterfield, 59 N. H. 354 (set-off as to necessities furnished); 92 Ind. 103; *Trainer v. Trumbull*, 141 Mass. 527 (support upon an expectancy).

<sup>1</sup> See *Bonney v. Reardin*, 6 Bush (Ky.), 84; 84 Ga. 440.

<sup>2</sup> § 415.

<sup>3</sup> *Rush v. Wick*, 31 Ohio St. 521; 42 Ill. App. 511. So, too, the general rights and liabilities of a husband as to custody, maintenance, and the like, which are incidental to the marriage relation, apply, from reasons of policy, to infants as to adults. § 415. Even though such marriage failed of the parent's consent. *Commonwealth v. Graham*, 157 Mass. 73. And see 13 M. & W. 259, as to burial.

<sup>4</sup> § 416. As where one acts as executor or administrator or trustee or civil officer. 7 Met. (Mass.) 164; *Saumm v. Coffelt*, 79 Va. 510; 20 Ohio St. 97; 10 Ala. 348; *Nordholt v. Nordholt*, 87 Cal. 552.

<sup>5</sup> The attribute of sovereignty may perhaps enter as an element into the public acts of infants in this country who are improperly chosen to civil offices, yet whose official acts should be sustained.

<sup>6</sup> § 417; *Townsend v. Downer*, 32 Vt. 183; *Chicago Mutual Association v. Hunt*, 127 Ill. 257. Cf. 63 Hun, 263.

<sup>7</sup> § 418. Supposing the proceedings regular. 75 N. Y. S. 272 (as in sale of his land, &c.). As if the infant make equal partition of lands, or assign dower, or release a mortgaged estate on satisfaction of the debt. 3 Burr. 1801; *Jones v. Brewer*, 1 Pick. (Mass.) 314; 2 Penn. 115; 6 Clarke (Iowa), 353. But cf. as to distribution, *Kilcrease v. Shelby*, 28 Miss.

**435.** Whenever a statute authorizes a contract which from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed beneficial and binding upon them.<sup>1</sup>

**436.** An infant's recognizance or bail on a criminal charge is binding.<sup>2</sup>

161. The rights of a minor in land may be condemned under the power of eminent domain. 86 Ala. 206; 15 Col. 492.

<sup>1</sup> § 419. But fraud, circumvention, or undue advantage taken of infancy may avoid, as in other cases. 1 Mason (U. S.), 83; 2 Tex. 452; *United States v. Bainbridge*, 1 Mason, 83. And see *Franklin v. Mooney*, 2 Tex. 452. Contracts of enlistment are thus made binding. *Morrissey Re*, 137 U. S. 157; 1 B. & C. 345. Such statutes regard the consent of parent and guardian to some extent. 25 Wis. 390; 1 Low. (U. S.) 100; 3 Cliff. (U. S.) 439. So, too, a minor may be bound by his indentures of apprenticeship, executed in strict conformity to statute. § 419. Whether his covenants are obligatory, too, cf. 1 South. 84; 8 Johns. (N. Y.) 331; 2 Mass. 228; 3 B. & C. 484; 119 Ind. 532; 89 Ala. 164; 3 M. & S. 497. Infant's covenant to pay a reasonable premium for being taught the business enforced. [1891] 2 Q. B. 369. A provision not for the benefit of the infant under an indenture may render such an instrument inoperative. *Meakin v. Morris*, 12 Q. B. D. 352 (as to wages).

A minor's contract to support his bastard child held binding, because statute would have compelled it. *Stowers v. Hollis*, 83 Ky. 544.

<sup>2</sup> *State v. Weatherwax*, 12 Kan. 463; 94 Ind. 67; 21 Neb. 559; 49 Conn. 492; 57 Vt. 404. This may be partly out of respect to statute requirement; and partly because it is for his benefit not to be placed in confinement. § 420.

The right of an infant, nearly of age and an orphan without a guardian, to recover the wages due him under a contract for his services, should in the courts be favorably regarded. *Waugh v. Emerson*, 79 Ala. 295. But the reasonableness or prudence of an infant's contract is immaterial, where it is not one which, as matter of law, is binding upon him. 184 Mass. 348.

## CHAPTER IV.

### THE INJURIES AND FRAUDS OF INFANTS.

437. In this chapter we shall treat, (1), of injuries and frauds committed by an infant; (2), of injuries and frauds suffered by an infant.<sup>1</sup>

438. (1) As to injuries and frauds committed by an infant, it is a general principle that infancy shall not be permitted to protect wrongful acts.<sup>2</sup> So minors are liable civilly for their torts; and must respond in damages in all cases arising *ex delicto* to the extent of their pecuniary means, irrespective of the form of action which the law prescribes for redress of the wrong.<sup>3</sup>

<sup>1</sup> § 433.

<sup>2</sup> The privilege of infancy is given as a shield and not a sword. *Zouch v. Parsons*, 3 Burr. 1802.

<sup>3</sup> § 433; 2 Kent, Com. 240, 241. An infant is then as fully liable as an adult in an action for damages occasioned by injury to the person or property of another by his wrongful act. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218. Cf. 3 Wend. (N. Y.) 391; *Neal v. Gillett*, 28 Conn. 437.

As where, in sport, he discharges an arrow and thereby disables a schoolmate; or aims a missile at one and accidentally hits another. 3 Wend. (N. Y.) 391; *Peterson v. Haffner*, 59 Ind. 130; *Conway v. Reed*, 66 Mo. 346. All the cases agree that trespass lies against an infant. *Huchting v. Engel*, 17 Wis. 231; 10 Vt. 71; 16 Mass. 389; *Tift v. Tift*, 4 Denio (N. Y.), 177; *Scott v. Watson*, 46 Me. 362 (procuring others to commit an injury); *McCoon v. Smith*, 3 Hill (N. Y.), 147 (nuisance); *McClure v. McClure*, 74 Ind. 108 (wrongful detention of premises); 49 S. W. 836 (libel). While, furthermore, an infant, as we have seen, cannot be sued for mere breach of promise to marry, one old enough to commit such an offence is liable in civil damages for seduction, whether accompanied or not by such a promise. *Becker v. Mason*, 93 Mich. 336; *Fry v. Leslie*, 87 Va. 269; 10 Vt. 71; *Scott v. Watson*, 46 Me. 362; *Smith v. Kron*, 96 N. C. 392 (trespass upon another's premises). An infant is not liable to arrest on civil process. But see 139 Mass. 458, 461.

The express command of the father may excuse the infant criminally, as for acting under constraint; yet he is answerable *civiliter* for injuries

**439.** An infant is not liable for mere violations of a contract, though attended with tortious results, and though the party ordinarily has the right to declare in tort or contract at his election. It must be remembered that, for his contracts, the infant is not ordinarily liable: for his torts he is. But to trace the distinction is sometimes difficult.<sup>1</sup>

**440.** For fraudulent representations the plea of infancy has been considered a good defence.<sup>2</sup>

he does to another. On the other hand, an infant's liability is not to be extended beyond acts committed by himself or under his immediate and express direction. 4 Rob. (N. Y.) 553; *Burnham v. Seaverns*, 101 Mass. 360.

<sup>1</sup> § 434. The plaintiff cannot convert anything that arises out of a contract into a tort, and then seek to enforce the contract through an action of tort. 8 T. R. 335 (immoderate driving); 1 South. (N. J.) 87; 2 Marsh. (Ky.) 485; 19 Vt. 505 (breach of warranty). But a more equitable principle pervades the later cases. Otherwise, where a bailee is guilty of conversion; *e. g.*, hiring a horse and then misusing. 14 C. B. n. s. 45; *Towne v. Wiley*, 23 Vt. 355; 50 Vt. 688; 3 Pick. (Mass.) 492; 14 R. I. 39; *Eaton v. Hill*, 235. Infant liable in trover. 6 Cranch (U. S.), 226; 2 Wend. (N. Y.) 137; 15 Me. 233; 4 B. & P. 140 (detinue). Infant liable, in general, for goods intrusted to his care, and unlawfully converted by him. § 434; 1 Gray (Mass.), 506. Replevin lies for the goods even where a suit for damages might fail. 15 Mass. 359. For stolen money and stolen goods converted into money, an infant is held liable in assumpsit. *Shaw v. Coffin*, 58 Me. 254; *Elwell v. Martin*, 32 Vt. 217. Yet his conversion of specific goods should be carefully distinguished from what is in substance a breach of his contract to sell and account for profits. 28 Barb. (N. Y.) 75; 19 Ga. 22. For embezzlement, an infant may be considered liable. 1 Esp. 172; *Elwell v. Martin*, 32 Vt. 217. And see 5 Hill, 391; 24 Ind. 115; *Mathews v. Cowan*, 59 Ill. 341; *Prescott v. Norris*, 32 N. H. 101 (false representations distinguished).

<sup>2</sup> § 435. Thus has it been held in false and deceitful representations of title. 32 N. H. 101; 29 Vt. 465; *Gilson v. Spear*, 38 Vt. 311. And still more frequently, that for a false and fraudulent representation that he was of full age, there is no remedy against the infant; whether money were advanced or goods intrusted to him on the strength of such representation. *Price v. Hewett*, 8 Exch. 146; 10 N. H. 184; 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Nash v. Jewett*, 61 Vt. 501; 26 Minn. 389; *Studwell v. Shapter*, 54 N. Y. 249.

Chancery handles its weapons with more freedom as to the infant's misrepresentation of full age. See *Overton v. Bannister*, 3 Hare, 503;

441. (2) As to injuries and frauds suffered by infants. Infants have a right to sue, by guardian or next friend, to recover damages for injuries done to person or property by the tortious acts of another. But by reason of their tender years, their rights and remedies receive a somewhat peculiar treatment in the courts.<sup>1</sup>

1 De G. & S. 90; § 426; *Unity and Banking Association Re*, 3 De G. & J. 63 (1858); 4 De G. & J. 458 (1859); *Inman v. Inman*, L. R. 15 Eq. 260. See *De Roo v. Foster*, 12 C. B. N. s. 272 (1862); *Wright v. Leonard*, 11 C. B. N. s. 258. Thus appears a modern tendency to afford relief, indirect if not direct, where a party is injured, through reasonable reliance upon an infant's false statement of full age. *Lamprière v. Lange*, 12 Ch. D. 675.

The civil-law doctrine is clearly that if a minor represents himself of age, and from his person he appears to be so, any contract made with him will be valid; and such was the Spanish law as formerly prevalent here. § 426. See *Hemphill, C. J., Kilgore v. Jordan*, 17 Tex. 341 (1870). And see *Kemp v. Cook*, 18 Md. 180; 59 Md. 344 (infant partner); 37 Neb. 359; 40 Tex. 32; 12 S. & R. (Penn.) 399; *Henry v. Root*, 23 N. Y. 544; 7 Bush (Ky.), 298; *Ferguson v. Bobo*, 54 Miss. 121; *Pemberton Building Association v. Adams*, 53 N. J. Eq. 258; *Rice v. Boyer*, 108 Ind. 472; 41 N. J. Eq. 630; *Ryan v. Growney*, 125 Mo. 474. Hence, apparently, the American doctrine on this point responds to the change now going on in the English courts. But cf. 5 Jones, Eq. (N. C.) 389; *Sims v. Everhardt*, 102 U. S. 300. Our American statutes sometimes quicken the infant's sense of honor. 6 Iowa, 353; § 426.

<sup>1</sup> § 427. The youth of a person injured does not extend the liability of the person causing the injury. *Sherman v. Hannibal R.*, 72 Mo. 62. See *Force v. Gregory*, 63 Conn. 167 (malpractice); 97 Ala. 181; 43 La. An. 63; 87 Cal. 545; *Carter v. Towne*, 98 Mass. 567 (selling explosives); *Shuford v. Alexander*, 74 Ga. 293 (no defence that infant has not returned the property, &c.).

Such actions are grounded upon the ignorance of so young a child and the negligence of those who fail to regard it. The adult party must regulate his own discretion to suit the minor with whom he deals, and act at all times with befitting prudence. Due average care according to age, sex, and capacity is all that the law exacts of any child of tender years, and not the average standard for adults, in judging of the child's contributory negligence; and wherever there is danger to which the infant exposes himself, it is material to consider whether his judgment and reflection were sufficiently matured to make that danger obvious. 83 Ga. 512; 120 N. Y. 526; *Illinois Central R. v. Slater*, 129 Ill. 91; *Greenway v. Conroy*, 160 Penn. St. 185; 83 Wis. 171; 119 Ind. 455; 77 Tex. 356; 123 N. Y. 645. In setting a child to perform a dangerous service, this

**442.** Contributory negligence of the parent or protector is now considered in such suits, as well as that of the child himself. A child too young to have discretion for himself cannot recover if his protector fails to exercise ordinary care, but he may if he uses such care as is usual with children of the same age, and the protector exercises ordinary care besides.<sup>1</sup>

principle applies. 119 Ind. 455; 84 Ga. 320; 56 Ark. 232; 83 Tex. 598; 87 Cal. 545.

A child may as a trespasser forfeit his right of action. *Mangan v. Atterton*, L. R. 1 Ex. 239. But not unless his trespass contributes essentially to the injury. See 26 Conn. 591; 37 Cal. 400; *Townley v. Chicago R.*, 53 Wis. 626. And a young child, even though a technical trespasser, may often recover for injuries where an adult might not; and this because the defendant had placed something dangerous or in a dangerous condition to which such children were readily attracted. *Haesley v. Winona R.*, 46 Minn. 233; *Penso v. McCormick*, 125 Ind. 116; *McCarraher v. Rogers*, 120 N. Y. 526. But cf. *Rodgers v. Lees*, 140 Penn. St. 475; *McGuinness v. Butler*, 159 Mass. 233; 150 Mass. 515. See § 429.

<sup>1</sup> § 429; 4 Allen (Mass.), 283; *Downs v. N. Y. Central R.*, 47 N. Y. 83; *Kerr v. Forgue*, 54 Ill. 482; 23 Wis. 186; *O'Flaherty v. Union R.*, 45 Mo. 70; *Baltimore, &c. R. v. State*, 30 Md. 47; 29 Barb. (N. Y.) 236; 42 Ill. 174; *Waite v. North-Eastern R. R. Co.*, 5 Jur. n. s. 936; *Pierce v. Millay*, 62 Ill. 133. Allowing a child less than two years old to be in the public street of a city without a suitable attendant is held usually to be a want of ordinary care on the parents' part, and if the child be injured there is no remedy. *Casey v. Smith*, 152 Mass. 294; 160 Penn. St. 647. Cf. 156 Mass. 291 (a danger unforeseen). But there are circumstances under which it would be found that the parent or protector of such a child was exercising ordinary care; while the child himself would be treated, doubtless, as incapable of personal negligence at so early an age, so as to defeat his right of action. See 38 N. Y. 455; 23 Wis. 186; 9 Allen (Mass.), 557. What would be expected of the custodians of these tender beings is a degree of care or diligence suitable to the capacity of the child; in other words, ordinary care and prudence in watching and controlling the child's movements; and this care and prudence should be proportionate to known dangers or to dangers which ordinary diligence might have made known to the custodian. 18 Ill. 360; 45 Mo. 70; 30 Md. 47; 129 Ill. 91; *Louisville R. v. Shanks*, 132 Ind. 395; 81 Wis. 239; 88 Mich. 225 (unforeseen use of a toy); *Downs v. N. Y. Central R.*, 47 N. Y. 83; 42 Ill. 174; 54 Ill. 482. The rule is to be reasonably and beneficially applied; and the circumstances are in general for the jury. The older and more capable the child, the less pertinent is of course the question of a custodian's prudence. *Weeks v. Pacific R.*, 56 Cal. 513; *Murley v. Roche*, 130 Mass. 330; 86 Ga. 40; 120 N. Y. 526; 81 Iowa, 1;



**443.** A parent may sue for damages caused his child by another's wrong, as for loss of his child's services during the period of minority, since such services belong to the parent.<sup>1</sup> But for damage to the person involving a permanent injury reaching beyond one's minority, the minor is entitled in his own right to recompense for such prospective loss.<sup>2</sup>

**444.** As to the arbitration, compromise, or release of injuries committed or suffered by infants, the principle of void and voidable and binding contracts must usually apply; and, as we may presume, a note or other security given to settle damages may not be sued upon without inquiry into its consideration, but it shall be good to the same extent as the tort which constituted its basis.<sup>3</sup>

78 Cal. 578. And wherever the child himself exercised due and sufficient care and prudence in fact, the care and diligence of a protector might well become immaterial in a suit for the child's own injury. *Chicago R. v. Robinson*, 127 Ill. 9; 66 Miss. 560; 69 Miss. 126. Such want of protection ought to bar the custodian's own suit, at all events; even though it should not that of the child. 138 Ill. 370. The doctrine of imputed negligence has been repudiated in some States. 89 Va. 780; 57 Penn. St. 187; 18 Ohio St. 399; 52 N. J. L. 446.

See further, *North Penn. R. v. Mahoney*, 57 Penn. St. 187; *Hopkins v. Virgin*, 11 Bush (Ky.), 677 (slander). As to injury done to a minor servant, see 76 N. Y. 125; 8 Baxt. (Tenn.) 324; *post*, Part VI.

A parent who knowingly allows his young child to remain in a dangerous employment without objection debars himself of suit by his own negligence. 122 Penn. St. 57. But where one employs a minor knowingly in a dangerous business without his father's consent or knowledge, he becomes liable to the father's suit in case of injury. *Texas R. v. Brick*, 83 Tex. 526.

<sup>1</sup> Part III. c. 4, *ante*; 105 Tenn. 702.

<sup>2</sup> § 430; *Central R. v. Brimson*, 64 Ga. 475. A double recovery for loss of the child's services during minority is not permitted. 91 Mich. 298. See *Judd v. Ballard*, 66 Vt. 668.

<sup>3</sup> See *Ray v. Tubbs*, 50 Vt. 688; *ante*, 429. Cf. 61 Conn. 50 (father's note to settle). And see 24 Ala. 622; 10 Barb. (N. Y.) 436; 6 Mass. 78; 37 Neb. 359; § 431. The parent cannot sue, as such, for the child's injuries; neither can he make a binding compromise or release, except as to his own demand upon the defendant. 4 Barb. (N. Y.) 453; *Passenger R. v. Stutler*, 54 Penn. St. 375; 82 Tex. 623. Such is the general rule as to next friend. § 450; *Tripp v. Gifford*, 155 Mass. 108; 149 Penn. St. 24; 53 W. Va. 515. There should be judicial sanction to such compromise.

## CHAPTER V.

### RATIFICATION AND AVOIDANCE OF INFANT'S ACTS AND CONTRACTS.

**445.** The infant may confirm his voidable contract or transaction on arriving at full age; and if he does so by such writings, words, or acts as amount to a legal ratification or affirmance, he will become liable then and thereafter. But what is in law a sufficient ratification or affirmance and what, too, is a sufficient avoidance, remain to be considered.<sup>1</sup>

**446.** Statutes sometimes undertake to define or divert the law in this respect.<sup>2</sup>

**447.** Independently of all statutes, however, the question has been raised, what language and what conduct on the part of the infant attaining to majority will suffice to give

<sup>1</sup> § 432. We have seen that the adult remains bound, while the infant may avoid; also that, while conveyances, &c., cannot be decisively repudiated or ratified until minority ends, personal property transactions or personal transactions may be avoided by the infant sooner. See c. 2.

<sup>2</sup> § 433. See Stat. 9 Geo. IV. c. 14, § 5 (Lord Tentarden's Act, 1828), which requires a promise or ratification in writing; 40 Me. 378; 1 Exch. 122. See also Infants' Relief Act of 1874 (37 & 38 Vict. c. 62); *Smith v. King*, [1892] 2 Q. B. 543. As to what constitutes ratification or a fresh promise upon majority, see 26 E. L. & Eq. 560; 5 C. P. D. 410; L. R. 4 C. P. D. 385; 1 C. P. D. 569; L. R. 10 Ch. 373; L. R. 4 Q. B. 1.

Some statutes regard the allowance of only a reasonable time after attaining majority for disaffirmance of a contract or conveyance made in infancy, requiring the infant both to disaffirm and to make restitution. 46 Iowa, 466; 64 Iowa, 315; 55 Iowa, 205; 59 Iowa, 679. Others seek to prevent sales of the minor's property for some time after he reaches majority. 69 Penn. St. 16. See 74 S. W. 377 (part payment after majority).

binding force to his acts originally voidable. The American cases on this point are numerous and contradictory.<sup>1</sup>

448. If decisions themselves may be regarded as pointing out a general rule, it seems to be this (no statute applying): that the mere acknowledgment that a certain transaction constitutes a debt is insufficient to bind him lately an infant; that an acknowledgment to the extent that he justly owes that debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his part, which are prejudicial to the adult party's interests, or evince his own intention to retain the consideration and advantages of a contract made during infancy, may be, especially when reasonable time has elapsed,

<sup>1</sup> § 434. Two principles are evidently in conflict: the one, that an infant should be protected against his own imprudence while under a disability; the other, that *bona fide* creditors ought not to be cheated. Some cases have given more prominence to the first principle, others to the second. "It has long been settled that a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment will not have that effect." 4 Allen, 95 (1862), per Metcalf, J. "The narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions." Per Davies, J., *Henry v. Root*, 33 N. Y. 545 (1865), and cases cited.

Mere lapse of time, with silence, will not usually amount to confirmation, unless the complete bar of limitations is fulfilled. *Wallace v. Latham*, 52 Miss. 291; *Prout v. Wiley*, 28 Mich. 164; 31 Minn. 468; 4 Me. 405. But a brief lapse of time, in connection with other circumstances making the infant's position inequitable if he means later to disaffirm, may amount to confirmation (such as using or disposing of the thing). 15 Ohio, 156; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; § 435. And so, perhaps, with tacit assent and delay under circumstances where silence is clearly not excusable. *Allen v. Poole*, 54 Miss. 323 (new expense incurred). See various cases commented upon in § 435, of a contradictory nature. Distinction is sometimes taken as between the late infant's acknowledgment of the debt and promise to pay it. See 4 Allen (Mass.), 95; 32 Penn. St. 509; 49 Conn. 492. We speak of "ratification"; yet if a transaction be only "voidable" the idea should be that of a binding effect unless specifically avoided. §§ 436, 437.

construed into a ratification, without an express promise, the presumption of honorable motives being fair and reasonable under such circumstances; and finally, that a distinct, unequivocal promise, verbal or written, made after attaining majority, is always sufficient, this apparently superseding the former promise altogether.<sup>1</sup> In cases of doubt, moreover, it would seem to be better to treat the evidence presented as constituting facts for the consideration of the jury, rather than a question of law for the court to pass upon.<sup>2</sup>

**449.** As to the infant's lands, affirmation or disaffirmance is postponed to his majority.<sup>3</sup>

<sup>1</sup> § 437. See cases collected in Am. editor's note to 16 E. L. & Eq. 558; 20 Ark. 600; 22 Barb. (N. Y.) 150; *State v. Plaisted*, 43 N. H. 413; 13 Met. (Mass.) 309; *Catlin v. Haddox*, 49 Conn. 492.

<sup>2</sup> *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 628.

Some cases go even farther, and require an express repudiation on the infant's part. But this is appropriate only to certain transactions, as in a solemn deed, requiring another deed equally solemn, or at least something in writing. 8 Taunt. 39; 13 Mass. 204; 10 N. H. 194; *Tunison v. Chambley*, 88 Ill. 378; 12 W. Va. 70 (suing to set aside disaffirmance); *Scranton v. Stewart*, 52 Ind. 69, 92. And so generally where the transaction is such that the late infant must take the initiative or else forfeit his right, being out of possession. There are many ways in which one may clearly disavow his intention of carrying into effect the contract made during infancy; and if disavowal be appropriate, his silence is not enough. *Davis v. Dudley*, 70 Me. 266. Equivocal or remote acts after attaining majority should not be construed readily into a binding ratification or election not to avoid. *Tobey v. Wood*, 123 Mass. 88; 52 Miss. 574; 75 Ill. 315; 118 Mass. 495. Any conditional ratification is subject accordingly. 4 Allen (Mass.), 95; *Chandler v. Glover*, 32 Penn. St. 509; *Huth v. Carondelet R.*, 56 Mo. 202; *State v. Binder*, 57 N. J. L. 374.

Reasonable time for an infant, on coming of age, to elect to confirm or avoid the acts and contracts of his minority, must depend in each case upon the particular circumstances; and in general the mental operation of election at majority is the fact to be legally established or inferred. *Stringer v. Life Ins. Co.*, 82 Ind. 100; 32 Neb. 610; 11 M. & W. 256, 265. And such election once made is irrevocable. *Scranton v. Stewart*, 52 Ind. 69, 92; § 437. As to effect of a foreign domicile, see (1900) 2 Ch. 87.

<sup>3</sup> § 438. An infant cannot during minority disaffirm his conveyance nor recover possession. See § 409. But see 15 Col. 492, as to rents and profits. Slight acts, such as acceptance of rents after attaining full age, is a ratification of the infant's lease. *W. Jones*, 157; 1 Ga. Dec. 91; *Smith v. Low*, 1 Atk. 489 (confirmation of a guardian's lease made

**450. The infant is not precluded from disaffirming his conveyance of real estate by the mere lapse of time, short of the full bar of limitations.<sup>1</sup>**

beyond the period of infancy); *Shipley v. Bunn*, 125 Mo. 445. An inconsistent conveyance to another will disaffirm his deed as infant. 2 *Overton* (Tenn.), 426; *Hoyle v. Stowe*, 2 Dev. & Bat. (N. C.) 320. The execution of a warranty deed to another without reservation of a mortgage incumbrance imports a disaffirmance of the mortgage; but the execution of a quitclaim deed or a conveyance subject to the mortgage does not. *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323; *Singer Man. Co. v. Lamb*, 81 Mo. 221. See § 438; 15 Mass. 22; 94 Ind. 67; 7 *Humph.* (Tenn.) 121 (junior mortgage).

As to the infant's mortgage, where purchase and mortgage back are one transaction, a minor cannot avoid the mortgage given without avoiding the purchase also. 8 *Fost.* (N. H.) 101; 6 *Greenl.* (Me.) 89. And see § 441. And an assignment of the mortgage will carry to the assignee all the mortgagee's rights, whether the infant affirms or disaffirms. 3 *Sandf. Ch.* (N. Y.) 431; 25 *Barb.* 399; 2 *Edw. Ch.* (N. Y.) 544. Even notes given for the purchase-money of land, not secured by mortgage, have been equitably enforced; and the court has refused to permit the notes to be disaffirmed and the land reclaimed. *Weed v. Beebe*, 21 *Vt.* 495. Cf. *Walsh v. Powers*, 43 *N. Y.* 23; *Terry v. McClintock*, 41 *Mich.* 492; *American Mortgage Co. v. Wright* (1894), *Ala.* Paying interest on mortgage note or suffering a mortgage to be foreclosed, held sufficient affirmation. *Terry v. McClintock*, 41 *Mich.* 492; *American Mortgage Co. v. Wright* (1894), *Ala.* But cf. *State v. Plaisted*, 43 *N. H.* 413 (avoidance of mortgage).

<sup>1</sup> § 439; 80 *Miss.* 741. Laches not imputable to an infant during the continuance of minority. *Hill v. Nelms*, 86 *Ala.* 442. But time which has commenced running against the ancestor continues to run against the infant heir. 55 *Ark.* 85; 114 *N. Y.* 595. An avoidance may be made any time before the statute has barred an entry. § 439; *Tucker v. Moreland*, 10 *Pet.* (U. S.) 58; 23 *Me.* 517; 20 *Ark.* 600; 14 *Ill.* 158; *Gillespie v. Bailey*, 12 *W. Va.* 70 (infant tenant in common); *Wallace v. Latham*, 52 *Wis.* 291; 28 *Mich.* 164; 24 *Fed. R.* (U. S.) 82; 120 *Mo.* 383. But disaffirmance is here required; and any solemn revocation, or a conveyance to some one else of that land repudiates the infant's conveyance; while any new conveyance or other decisive act by way of affirmation makes the infant's deed wholly valid. *Mette v. Feltgen*, 148 *Ill.* 357; *Moore v. Baker*, 92 *Ky.* 518; *Smith v. Gray* (1895), *N. C.* (acceptance of residue of purchase price). See as to *bona fide* subsequent party without notice. *Black v. Hills*, 36 *Ill.* 376; *Inman v. Inman*, *L. R.* 15 *Eq.* 260; *Weaver v. Carpenter*, 42 *Iowa*, 343.

Yet lapse of time, together with equitable circumstances, have in many instances sufficed to sustain an infant's deed. Thus it is held that

451. As to an infant's purchase, the same reasoning applies as to his transfer of property.<sup>1</sup>

an infant's deed will be confirmed by any deliberate act after he becomes of age, by which he takes benefit under it or recognizes its validity, or encourages others to make outlay. 8 Jones (N. C.), 425; 5 Yerg. (Tenn.) 41; Wallace v. Lewis, 4 Harring. (Del.) 75; 4 Seld. (N. Y.) 235; Davis v. Dudley, 70 Me. 236. Cf. 78 Va. 584; Brantley v. Wolf, 60 Miss. 420; 73 Md. 297. And see Hall v. Simmons, 2 Rich. Eq. 120; Alsworth v. Cordtz, 31 Miss. 32; 4 Desaus. (S. C.) 465; 15 Ohio, 156; 16 N. H. 385 (permitting others to purchase); 156 Penn. St. 91. Forgetfulness of the deed made in infancy is no sufficient excuse for delay to disaffirm. Tunison v. Chamblin, 88 Ill. 378. See 73 Md. 297; 73 Tex. 344. A brief statute limit is sometimes set. In short, there is, according to the best authorities, a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and those which are sufficient to confirm it. The deed cannot be avoided except by some solemn act, or, as some assert, an act equally solemn with the deed itself; but acts of a character which would be insufficient to avoid such a deed may amount to an affirmation of it. Irvine v. Irvine, 9 Wall. (U. S.) 617 (taking a lease of the premises from the person to whom he had conveyed held evidence of affirmation). And see § 439; 69 Penn. St. 449; 71 Mo. 623.

A conveyance, in due season after majority, to a third person has been taken to be sufficient disaffirmance of the minor's deed, especially when coupled with express notice of disaffirmance, and followed by the grantee's entry. See Riggs v. Fisk, 64 Md. 100; Haynes v. Bennett, 53 Mich. 15; Dawson v. Helmes, 30 Minn. 107; 44 Ark. 153 (one judge dis.). And another means of disaffirming the conveyance of one's lands during infancy consists in bringing an ejectment suit or similar proceeding upon solemn notice. Craig v. Van Bebber, 100 Mo. 584; Richardson v. Pote, 93 Ind. 423. As to the necessity of entry actual or by writ (local statute sometimes applying here), see § 440 and cases cited. To render a subsequent conveyance an act of dissent to the prior conveyance of an infant, it must be inconsistent therewith, so that the two cannot stand together. Leitensdorfer v. Hempstead, 18 Mo. 269; 7 Humph. (Tenn.) 121; 18 Neb. 121 (mortgage to another). See 3 Halst. Ch. (N. J.) as to an infant's exchange of lands; Nathans v. Arkwright, 66 Ga. 179.

<sup>1</sup> § 441. As to his lease, see § 452. Ratification of a purchase of land involves ratification of a mortgage back to secure the purchase-money; one cannot repudiate the former and not the latter, for this would be inequitable. Ready v. Pinkham, 181 Mass. 351; (1902) 1 Ch. 1; Langdon v. Clayson, 75 Mich. 204; Kennedy v. Baker, 159 Penn. St. 146; 88 Cal. 294. See Sewell v. Sewell, 92 Ky. 500 (power to sell). If an infant, after

452. With regard to an infant's executory or continuing contracts, or transactions importing on his part the fulfilment of duties, during the period of infancy, which might be prejudicial or irksome, he is allowed to disaffirm and avoid during infancy, wherever the contract was not of that beneficial or positive kind which the law pronounces binding. This is strictly in accordance with the general doctrine that one shall not be prejudiced by his own acts committed while an infant.<sup>1</sup> Such a rule applies to an infant's contract of service.<sup>2</sup>

coming of age, long retains landed property purchased by him during minority for his own use, or disposes of it, or exercises acts of dominion such as are only conscientiously done with intent to ratify or affirm, affirmation or ratification may be inferred. 1 Me. 11; *Boyden v. Boyden*, 9 Met. (Mass.) 519; 10 N. H. 561; *Cheshire v. Barrett*, 4 M'Cord, 241; 5 Bush (Ky.), 478; *Henry v. Root*, 33 N. Y. 526. But the infant on coming of age has of course the right to disaffirm as well as to affirm the purchase by appropriate acts. *Williams v. Williams*, 85 N. C. 313; 51 Minn. 185. Where a deed made to an infant is beneficial to him, equity will infer an acceptance on his part, whether he knew of the conveyance or not; but he may reject the grant upon reaching majority if he so elects. *Owings v. Tucker*, 90 Ky. 297; *Sneathen v. Sneathen*, 104 Mo. 201.

<sup>1</sup> Trading or partnership contracts, contracts to purchase or sell, promises to marry, &c., are here included. § 443; *Indianapolis Chair Co. v. Wilcox*, 59 Ind. 429; *Robinson v. Weeks*, 56 Me. 102; *Goode v. Harrison*, 5 B. & Ald. 147; *Dunton v. Brown*, 31 Mich. 82; *Gregory v. Lee*, 64 Conn. 407 (a lease to him); *Cummings v. Everett*, 82 Me. 260; 12 Ill. 470; *Riley v. Mallory*, 33 Conn. 201; 92 Ala. 463; *Shurtleff v. Millard*, 12 R. I. 272 (bid at auction). A disaffirmance during infancy, where thus permitted, may require something different from disaffirmance at majority, something more explicit perhaps, and nearer to an express repudiation; though each case, as in the case of election at majority, should be governed by its own circumstances. To bind him he must confirm such a contract after attaining majority.

<sup>2</sup> § 443; 37 Vt. 647; *Ray v. Haines*, 52 Ill. 485; 13 Wis. 185; *Gaffney v. Hayden*, 110 Mass. 137; *Spicer v. Earl*, 41 Mich. 191; 4 Dev. & Bat. 498; 17 Me. 38; 125 Ind. 398. An infant who contracts to perform labor for a fixed time at a definite rate may put an end to it whenever he chooses during minority, and claim compensation *pro rata* for his services. But reasonable offsets should be allowed. 25 Vt. 206; 27 Mo. 308; 9 Mich. 274; *Breed v. Judd*, 1 Gray (Mass.), 455; *Roundy v. Thatcher*, 49 N. H. 526 (part payments, board, clothing, &c.). The

**453.** Where a new promise is requisite on reaching majority, it must be made to the party with whom the infant contracted, or to his agent or attorney; not to a stranger.<sup>1</sup> It is not essential to a valid ratification that the person lately an infant should know that he was not legally liable on his contract made during infancy; for ignorance of the law excuses no one.<sup>2</sup>

**454.** As to restoring consideration upon disaffirmance or avoidance, an infant's own purchase-money, or money volun-

infant may set off his own labor against the employer's demand for necessities, and recover any balance accordingly; but mutual offsets are proper. 22 Wis. 93; 27 Ind. 323. If the infant continues in service after he becomes of age, without demanding increase of wages or other modification of the contract, this is good evidence of his affirmation of the contract. *Spicer v. Earl*, 411 Mich. 91; *Forsyth v. Hastings*, 27 Vt. 646. One is not precluded from avoiding at majority a contract of service if something be due him, although it has been fully executed. 150 Mass. 448.

A contract made by a parent or guardian, or a stranger, in an infant's name, acquires no obligatory force against the infant himself, apart from the latter's knowledge and consent; and if it be the infant's own contract, then the usual right of ratification or avoidance remains open to him. § 444; *Bicknell v. Bicknell*, 111 Mass. 265; *Wood v. Truax*, 39 Mich. 628; 42 Mich. 134. On the other hand, a third person not in privity with the infant has no right to say that the infant shall not on majority make or assume any contract or transaction he pleases. 34 E. L. & Eq. 447. Minors whose property has been sold without legal authority by parents, guardian, or any one else, can recover it again upon the principles already discussed. 59 Tex. 381, 401; *Self v. Taylor*, 33 La. An. 769. Part IV. c. 7. See 4 Lea (Tenn.), 405. So, too, will purchasers or mortgagees from the infant be protected against acts of the parents which disregard the child's rights. 94 Ala. 223.

<sup>1</sup> § 445; *Bigelow v. Grannis*, 2 Hill (N. Y.), 120. But see *Mayer v. McLure*, 36 Miss. 389; 4 Met. (Ky.) 309; 10 N. H. 220.

<sup>2</sup> 4 Allen (Mass.), 570; *Ring v. Jamison*, 66 Mo. 124; 71 Conn. 181; *Anderson v. Soward*, 40 Ohio St. 325; *Clark v. Van Court*, 100 Ind. 113. See dictum *contra* in 5 Esp. 103; 3 Barr (Penn.), 428. And see *Wilson v. Life Ins. Co.*, 60 Md. 150 (fraudulent inducement).

Such acts as notice of disaffirmance, and then bringing an appropriate suit, amount fairly to avoidance of an infant's contract, in various instances. See *ante*, § 440; *St. Louis R. v. Higgins*, 44 Ark. 293 (release of infant); 30 Fed. (U. S.) 697. But all affirmation or disaffirmance must be *in toto* and not partial. 188 Mass. 317; 105 La. An. 768.



tarily paid by him under a contract from which he has derived no benefit, may be recovered back by him.<sup>1</sup> And, to speak generally, it is only when an infant on disaffirming his contract or transaction at majority still has the consideration, that he can be compelled to return it as the condition of disaffirmance; restitution in full not being a prerequisite, but restitution of the advantages as they still remain to him and capable of being restored.<sup>2</sup> In other words, if the infant has wasted or squandered the consideration he may repudiate without restitution.<sup>3</sup> All that is usually asserted is that the repudiating infant should be made to place the adult *in statu quo* as far as possible.<sup>4</sup>

<sup>1</sup> *Shurtleff v. Millard*, 12 R. I. 272 (deposit at an auction bid); 10 Daly (N. Y.), 352; 44 Ark. 293; § 446. Purchase-money in disaffirming a sale or purchase of land might come fairly into an account for adjusting rents and profits. Offer to refund not needful before his suit. 15 Ohio, 156; 24 Ind. 385; 27 Gratt. (Va.) 857; *Green v. Green*, 69 N. Y. 553; *Moore v. Baker*, 92 Ky. 518. But cf. 17 Tex. 417; 55 Tex. 281. But he cannot on attaining full age hold to an exchange or purchase, made by him in infancy, with its advantages, and thus affirm the transaction, while pleading his infancy to avoid payment of the purchase-money. 6 Conn. 494; 8 Tex. 397; 5 Humph. (Tenn.) 70; 26 Ala. 446; *Wilie v. Brooks*, 45 Miss. 542; *Kerr v. Bell*, 44 Mo. 120.

<sup>2</sup> *Chandler v. Simmons*, 97 Mass. 508; *Green v. Green*, 69 N. Y. 553; *Dill v. Bowen*, 54 Ind. 204; 138 Mass. 310; 12 R. I. 272.

<sup>3</sup> *Morse v. Ely*, 154 Mass. 458; *Craig v. Van Bebber*, 100 Mo. 584; 73 Tex. 344, 349. Where an infant has the privilege of repudiating during infancy, as in the case of personal property transactions of sale, purchase, or exchange, a similar rule applies as to restoring consideration. *Corey v. Burton*, 32 Mich. 30 (a chattel mortgage); *Curtiss v. McDougal*, 26 Ohio St. 66; 48 Wis. 601; *White v. Branch*, 51 Ind. 210. An infant should give notice of his election to avoid or make a demand. *Betts v. Carroll*, 6 App. 518. See, further, 30 Minn. 107; 106 Ill. 519; 95 N. C. 286; 71 Ala. 248.

<sup>4</sup> 69 Miss. 328; 36 Neb. 51. And hence the ready disposition in so many modern cases to treat the transaction of minority as affirmed, whenever one, after attaining majority, retains deliberately and enjoys the fruits of the transaction or disposes of the consideration, as also to refuse him, on repudiation, any unjust advantage. *Brantley v. Wolf*, 60 Miss. 420; 128 Mass. 99. And see various illustrations, § 446, such as restoring damaged property, rescinding a trade contract while seeking its benefits, &c.

**455.** Avoidance through an infant's agent is sometimes permitted.<sup>1</sup> And peculiar rules have applied to an infant married spouse.<sup>2</sup>

**456.** Chancery sometimes elects for an infant under its own rules of procedure.<sup>3</sup>

<sup>1</sup> § 448 a. See 112 N. C. 261; 99 Mo. App. 513; *Towle v. Dresser*, 73 Me. 252; 184 Mass. 348. Infant's appointment of an agent, *semble*, is avoidable. *Ib.*

<sup>2</sup> § 447. As to the disability of coverture superadded to that of infancy, see *ib.*; *North v. James*, 61 Miss. 761; 78 Mo. 212; 61 Tex. 60; *Sims v. Bardoner*, 86 Ind. 87. But as to affirmance or disaffirmance made with husband's consent or when discoverd, see 99 Ind. 469; 136 Penn. St. 588; 119 Ind. 187; 82 Me. 260.

<sup>3</sup> § 448. As in authorizing a change from one kind of property to another, or in selling lands, &c. Part IV. cs. 6, 7; *Edwards Re*, L. R. 10 Ch. D. 605; 49 Ala. 153. As to proceeds of real or personal property sold in minority retaining otherwise their original character, see 1 Kern. (N. Y.) 544; 1 Tenn. Ch. 47. Chancery may thus authorize leases, or make partition binding; or enforce a vendor's lien; or compromise a claim; or exercise discretion as to selling an infant's property. § 448; 7 Bart. (Tenn.) 502; 57 Miss. 183; 16 Ch. D. 41; 91 U. S. 638; 85 Va. 597; 64 Ala. 410 (posthumous child).

The infant's own affirmance of the decree in chancery or under statute, on majority, is a double confirmation. 76 Ill. 18, 246. Infants must be parties to such bills in equity, as, for instance, in affecting their title to real estate. See as to service upon infant, 65 Me. 352; 64 Ala. 406; 89 Ill. 71; 64 Ind. 195; *Insurance Co. v. Bangs*, 103 U. S. 435. Concerning joinder of guardian, see next chapter.

## CHAPTER VI.

### ACTIONS BY AND AGAINST INFANTS.

457. As to actions at law by infants, while process is sued out in the infant's own name, it is in his name by another; that is to say, some person of full age must conduct the suit for him. The same principle applies to all civil actions, whether founded on a contract or not.<sup>1</sup> And the rule is to sue on his behalf by guardian or (*prochein ami*) next friend.<sup>2</sup>

<sup>1</sup> § 449; 178 Mo. 528.

<sup>2</sup> § 449. See *ib.* as to old English rule. And see 3 Robinson's Pract. 229. The modern practice is to appoint a special person as *prochein ami* only in case of necessity, where an infant is to sue his guardian, or the guardian will not sue for him, or it is improper that the guardian should be the *prochein ami*. In other cases, the rule is to sue by guardian or *prochein ami*. 1 Dowl. & Ry. 13; 42 Ala. 184. But an infant may sue by his next friend though he have a guardian, if the guardian does not dissent. 11 Vt. 273; 13 Tex. 298. And in some States the choice allowed the infant is still more liberal. 18 Ala. 338. And see as to changing the next friend, 45 Ala. 215; 26 Tex. 460; 22 Md. 346; 28 W. R. 762.

An infant cannot prosecute an action either in person or by attorney, but advantage must usually be taken by plea in abatement. 3 Pick. (Mass.) 213; 2 Johns. (N. Y.) 192; 6 Ind. 8; § 449; 5 B. & Ald. 418; 13 East, 6. But as to the infant himself, see 36 Mo. 324. He may repudiate the judgment if entered against him. 112 N. C. 642. And see 8 Pick. (Mass.) 552 (amendment allowed); 11 Wend. (N. Y.) 164; *Woodman v. Rowe*, 59 N. H. 453; 66 Ga. 477 (effect of arriving at majority); 112 N. C. 642.

The special admission of *prochein ami* or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action specified. Macphers. Inf. 353; 3 Robinson's Pract. 229. In any event, the interests of the person who sues as guardian or next friend must not be hostile to that of the infant. 85 N. C. 113; 104 Ill. 80. See 3 Pick. (Mass.) 219, as to limiting such cause of action.

The *prochein ami*, like the guardian, is by the old practice appointed by the court before the plaintiff can proceed in the action, and no legal

458. In actions at law against infants, the infant can appear and defend by guardian only, and not by attorney or next friend, or in person.<sup>1</sup> The process is the same against an infant as in ordinary cases; but he needs some one to conduct his defence, and hence every court, wherein an infant is sued, has power to appoint a guardian *ad litem* for the special purposes of the suit, when otherwise he might be without assistance.<sup>2</sup> The writ and declaration in actions at law

right of parentage or of guardianship will enable any one to act for the infant without such appointment. § 450; 1 Dowl. & Ry. 13. But cf. 6 Ch. D. 19; 33 Kan. 109. And see 45 Ala. 215; 94 N. C. 473; 16 Kan. 29. Dismissal of action by next friend for infant, because not for the infant's interest. 59 Iowa, 634 (code). And see next friend's interest adverse to the infant, 104 Ill. 80. Local codes furnish their respective rules of practice; and statute formalities should be carefully observed. But special averments of infancy, &c., are not commonly required. 91 Ind. 522. Whether an infant or his next friend can sue *in forma pauperis*, see 7 Lea (Tenn.), 717; 92 Ind. 103; 13 Abb. (N. Y.) N. Cas. 182. A bond under some codes is required of the next friend. 19 Fla. 438. See 66 Md. 325 (actions by State). Father suitable for next friend. 203 Ill. 536.

While, in theory, however, the *prochein ami* is still legally appointed by the court, such formalities are now, in practice, very generally waived. In various American States no entry of record is requisite admitting a person to sue as guardian or next friend, the recital in the writ and count being deemed sufficient evidence of admission unless seasonably challenged by the opposite party, when the order may be supplied, or the court on its discretion may remove the party. See 58 Me. 236; 1 Rand. (Va.) 151; 54 Miss. 644; 76 Conn. 426. And see 22 Ill. 140; Gray v. Parke, 155 Mass. 443; 16 R. I. 512. The authority of next friend continues, though without appointment, until the court removes him. 155 Mass. 443. But cf. 12 Wend. (N. Y.) 191; 44 Barb. (N. Y.) 173; 21 Iowa, 54. So, too, in this country, more deference seems to be shown to the infant's wishes than in England, if the infant have discretion. 8 Cush. (Mass.) 506; 2 Ind. 399; 6 Rich. (S. C.) 329. An infant reaching full age may conduct his suit for himself. As to custody of money recovered and liability for costs, &c., see § 450 and local decisions. 105 Tenn. 515. See further, 155 Mass. 108; 149 Penn. St. 24; 149 Ill. 73; 97 Ala. 201.

<sup>1</sup> § 451; 8 Johns. (N. Y.) 418; 3 Pick. (Mass.) 213; 4 J. J. Marsh. (Ky.) 592; 21 Vt. 529; Bush v. Linthicum, 59 Md. 344; 206 Penn. St. 220; 102 Mo. App. 65.

<sup>2</sup> 17 S. C. 435; 66 Cal. 53; 152 Mass. 585.

A guardian *ad litem* is one appointed for the infant to defend in the

against infants are to be made out as in ordinary cases.<sup>1</sup> Infancy may be specially pleaded in bar.<sup>2</sup>

particular action brought against him, and is therefore to be distinguished from guardians of the person and estate. § 451; 2 Paige (N. Y.), 27. If there be a general chancery, probate, or testamentary guardian already appointed, it is his place, generally speaking, to defend the infant from all suits, so long as his authority over the infant's property continues and his interest is not adverse in the suit; this being, however, a matter usually regulated in this country by statute. See 34 Ind. 337; 64 Cal. 529; 59 Wis. 110; 72 N. C. 127; 185 Ill. 629; 82 Ky. 226. Under various practice codes, infants should be specially defended by a guardian *ad litem*, and not by the general guardian. 94 N. C. 478.

What has been observed of the appointment of *prochein ami* may be said, in general, of that of the guardian *ad litem*. In a criminal case no guardian *ad litem* is appointed. But in a civil case proceedings against an infant are liable to be reversed and set aside for irregularity, where no guardian *ad litem* has been appointed for him, unless, perhaps, his regular guardian having no adverse interest has appeared in his defence; and process must, besides, have been first regularly served upon the infant; though in this latter respect the rule of the several States is not uniform. § 451; 26 Ind. 287; 15 C. B. n. s. 474; 39 Ala. 150; 88 N. C. 35. Cf. personal service on infant or others in the suit, 42 Miss. 155; 57 Ala. 614; 45 Wis. 60; 84 N. Y. 622; 63 Cal. 554; 19 Fla. 852; 137 Penn. St. 569; 23 S. C. 154, 187; 91 N. C. 359. A judgment rendered against a minor without the appointment of a guardian *ad litem* is not void, but rather voidable. *Walkenhorst v. Lewis*, 24 Kan. 420; 120 Mo. 135; 42 Minn. 84; 134 Ind. 421; 120 N. Y. 433; 110 Ga. 342; 92 Tex. 568; 90 N. C. 197; 64 Cal. 529. But cf. 137 Penn. St. 433. The judgment is *prima facie* correct, and errors must be prejudicial to the infant's interest in order to be thus availed of. 10 Bush (Ky.), 617. An infant may appeal from a judgment against him, or have it reversed for error, at any time during minority without waiting for his majority. 79 Ky. 40. Or rather the guardian appeals. 73 Md. 451; 185 Ill. 59. See 127 Ill. 395. As to publication where infant is a non-resident, see 113 U. S. 179. Irregularities of procedure or delay in the appointment are often cured by the judgment; and even though the judgment be voidable, lapse of time and laches on the part of an infant after reaching majority may leave him altogether without an opportunity to set the judgment aside, especially if no prejudice has resulted, as in the usual case of his voidable transactions. 45 Mo. 401; 60 Barb. (N. Y.) 117; 49 Iowa, 267; 3 Houst. (Del.) 458.

<sup>1</sup> § 451; 12 N. H. 515; 9 Ind. 481.

<sup>2</sup> *Hillegass v. Hillegass*, 5 Barr (Penn.), 97. And see further, § 453; 138 Mass. 318 (proof).

459. The same leading principles are recognized in equity proceedings by or against infants; and the doctrines of next friend and guardian *ad litem* receive ample discussion in the chancery courts.<sup>1</sup>

<sup>1</sup> § 452.

Among the miscellaneous matters of chancery practice relating to infants may be mentioned proceedings in partition, orders for maintenance and education, the management of trust funds by guardians and other trustees, and the award of custody. In the appointment of guardians *ad litem*, courts of chancery will exercise a liberal discretion; in all proceedings of this character, the appointment of a guardian *ad litem* to appear in behalf of infants interested in the proceedings is regarded as proper and even necessary, when they have no general guardian or the general guardian has an adverse interest; personal service upon the infants, besides, is usually requisite; and a decree rendered without observance of full formalities may be reversed for error. See § 452 and cases cited; 1 Daniell Chancery Practice, *passim*. It is the rule in many States, as it was the old practice in chancery, to allow an infant his day, after he attains majority, to set aside a decree against him; thus, in effect, rendering such decrees in chancery voidable rather than binding, so far as he is concerned, and treating him more than ever upon the footing of a privileged person. *Ib.* Rule now modified or abrogated in some States. 15 N. Y. Supr. 348; 116 Mass. 377.

If there be an absolute decree made against a defendant who is under age, and who has regularly appeared by a guardian *ad litem* and has been served with process, he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or fundamental error. 1 Dan. Ch. Practice, 205; 46 Ala. 418; 64 Ga. 78; 34 N. Y. 555; 131 Ill. 309; 90 Tenn. 445; 131 Ill. 309. See 145 Ill. 500 (*bona fide* third party without notice); 190 Ill. 47; 63 N. H. 458 (probate decree); 81 Mich. 167; 45 N. J. Eq. 632. As to the binding force of judgments at law, the rule does not seem to be equally strong. *Ante*, 458. But the disposition in some States is to apply a similar principle. See 15 N. Y. Supr. 348; 43 Iowa, 213.

Wherever the substantial interests of infants are involved, nothing can be established by admissions or stipulations; but proof is necessary. 56 Mich. 557; 35 W. Va. 143; 139 Ill. 368; 146 Ill. 227. And see § 453.

## PART VI.

### MASTER AND SERVANT.

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#### CHAPTER I.

##### NATURE OF THE RELATION; HOW CREATED AND HOW TERMINATED.

**460.** A master is one who has legal authority over another; and the person over whom such authority may be rightfully exercised is his servant. Our present consideration of this relation will be brief and strictly confined to domestic or menial service.<sup>1</sup>

**461.** The contract of hiring determines the specific relation of domestic or household service, now that mutual consent is duly regarded. If the hiring be general, without any particular time limited, the old law construes it into a year's hiring.<sup>2</sup> But custom, however, modifies this principle, and

<sup>1</sup> § 460; 106 La. An. 371 (right to direct); 176 Ill. 100 (power to discharge). And see at length, §§ 454-457, concerning the relations of master and workman, and master and apprentice, — topics here omitted. Household service in America in these days is seldom on an extensive scale, while the legal topic itself broadens out greatly into hired employment, such as our present limited space forbids us to discuss.

<sup>2</sup> § 461; 1 Bl. Com. 425 (applicable particularly to agricultural employment). By custom such contracts have now become determinable in the case of domestic servants, upon a month's notice, or, what is an equivalent, payment of a month's wages. 2 Cr. M. & R. 54; 5 B. & Ad. 904; *Fewings v. Tisdal*, 1 Exch. 295; 2 Vr. (N. J.) 343. Laborers are hired frequently by the day, and to hire by the week is not unusual. 5 East, 382. Yet, as to hiring in general, the rule still is that if master and servant engage without mentioning the time or the frequency of payment, it is a

the date and frequency of periodical payments are material circumstances in each case.<sup>1</sup>

**462.** The Statute of Frauds must be kept in view, with its requirements, in any contract of hiring.<sup>2</sup>

**463.** Any adult person may become a master or servant in the domestic sense, if free from other incompatible engagements; and the service need not be performed under a clear formal contract, for the service may be constituted *de facto*. The usual law of contracts applies to all who enter such a relation.<sup>3</sup>

general hiring, and in point of law a hiring for a year, — a rule, however, founded in English rather than American usage. Smith, Mast. & Serv. 41, 42.

<sup>1</sup> 10 N. Y. 108; Beach v. Mullin, 5 Vr. (N. J.) 343; Lyon v. George, 44 Md. 295. Intention governs; and there may be special stipulations (such as engaging for a summer or a winter season), and the periodical payments are not conclusive as to the periodical hiring. § 458. See 51 N. J. L. 133 (express hire for year with payments monthly); 106 Mass. 56; 28 Wis. 131. The rule as to hiring for a period does not apply to cases where there has been a service, but no contract of hiring and no circumstances from which a contract can be inferred; but here reasonable recompense during the service is recoverable. And a contract of hiring cannot be presumed at all where the circumstances tend to rebut altogether such a presumption. 1 B. & Ald. 178 (paupers taken out of charity or for their board); 1 B. & Ad. 912; Smith, Mast. & Serv. 42. Menial or domestic servants are at this day liable by custom to discharge, at all events, upon payment of a month's (or lesser periodical) wages. § 459. See Jennings v. Lyons, 39 Wis. 553; 51 N. J. L. 133; 17 C. B. N. s. 27.

<sup>2</sup> Writing *e. g.* required where service is to commence in the future and to last for a year or more. § 459. As to restraint of trade or a term illegally long, see § 480. Oppressive or one-sided contracts of service are against public policy in these days. Parsons v. Trask, 7 Gray (Mass.), 473.

<sup>3</sup> § 461. Thus an offer to employ another does not bind the person making it until he is given to understand that it is accepted; and there must appear a voluntary coincidence in a common understanding, whether express or implied and whether by writings or parol. McDonald v. Boeing, 43 Mich. 394. Though wages are generally fixed in a contract of domestic hiring, this is not indispensable; for if one is hired without such stipulations the obligation is to pay whatever is just and reasonable; and the caprice of neither master nor servant can fix such a standard. See §§ 472, 473, *post*. See 26 Vt. 178; 20 N. H. 490; Alton v. Mulledy, 21 Ill.



**464.** A domestic servant is presumed to be hired by the husband, or head of the house; and if the wife makes such contract, for the common home, she acts presumably as her husband's agent, being very commonly his fit representative, in dealing with those employed of her own sex in particular.<sup>1</sup> But under our married women's acts, and agreeably to our later policy, a wife may contract for domestic service of her own or on her own credit.<sup>2</sup>

**465.** As to terminating a contract of service peremptorily, the summary and harsh method which befits a real master is to discharge the servant. The servant on his part will summarily withdraw from the service, if dissatisfied, or, by striking, as it is called, invite his prompt discharge. The milder termination of the employment relation is by a servant's resigning; and a fair employer will often prefer to induce his employee, if he can, to tender his resignation and then accept it, rather than resort to dismissal and a discharge.<sup>3</sup>

76. Engagement may be through some employee of authority. 111 Penn. St. 343.

Where one is neither employed, paid, nor controlled by another, he is not his servant in the legal sense. *McGuire v. Grant*, 1 Dutch. (N. J.) 356. See *Water Co. v. Ware*, 16 Wall. 566; 6 Rich. (S. C.) 297. We have seen that adult children or orphans brought up in a family are sometimes *de facto* servants so as to lay the foundation of certain suits. 125 Ind. 398; §§ 269, 274, *ante*. Indeed, the relation of master and servant may be implied from circumstances, in such sense that one may be held liable for the acts of another as his servant; no express contract need be shown. *Growcock v. Hall*, 82 Ind. 202; 17 Mo. App. 212. One may let his own servant (with or without his own personal property) to another in such a way as to make the hirer the responsible master *pro hac vice*. 64 Wis. 616. But in all such cases there should appear, if not an express contract for remuneration, meritorious circumstances at all events, such as to raise a reasonable inference of an understanding for service. 137 Ill. 403.

<sup>1</sup> § 461 *a*; *Allen v. Keilly*, 18 R. I. 197.

<sup>2</sup> 17 R. I. 81.

<sup>3</sup> § 463; *Jones v. Graham Trans. Co.*, 51 Mich. 539. The causes which justify peremptory discharge by the master are various, but most decisions are reducible to three leading classes: (1) wilful disobedience of a lawful order; (2) gross moral misconduct; (3) habitual negligence or kindred fault in the performance. *Smith, Mast. & Serv.* 70; § 463.

As to (1) see 2 Stark. 256; 11 Q. B. 742; 14 M. & W. 112. Where

**466.** Termination of a contract of service, like all other personal contracts, may be by mutual consent, or by the death

the misconduct is slight, a first offence, and not injurious, where the reasons for disobedience are extreme, and where the servant's general conduct is exemplary, the mutuality of such contracts is properly considered. *Shaver v. Ingham*, 58 Mich. 649. An obstinate refusal to do something clearly outside the line of duty or an unlawful act is clearly no ground for dismissal. 7 Dowl. 348; 56 Wis. 67; 59 Ill. App. 440. But for insolent and wilful disobedience of orders, especially if repeated, a servant may generally be dismissed. *Beach v. Mullin*, 5 Vroom (N. J.), 343; *Bailey v. Lanahan*, 34 La. An. 426; § 462; 163 N. Y. 351; 190 Ill. 201. Positive refusal to perform gives the master a right to discharge without waiting for the time of performance. 189 Ill. 200.

As to (2) see 4 C. & P. 208; 6 C. & P. 16 n.; *Spotswood v. Barrow*, 5 Exch. 110; 1 W. & S. (Penn.) 265; 1 Ill. App. 558; 5 Daly (N. Y.), 442; *Gonsolis v. Gearhart*, 31 Mo. 585; 75 Ga. 466; 7 Daly (N. Y.), 562; 10 Neb. 515. Immorality, fast living, or drunkenness (especially if habitual), theft, fraud, embezzlement, &c., are thus included. *Pearce v. Foster*, 17 Q. B. D. 536. But not fighting, regardless of the circumstances. *Larkin v. Hecksher*, 51 N. J. L. 133; *Burt v. Catlin*, 175 N. Y. 486.

As to (3) see § 462; (1899) 1 Q. B. 901 (injurious forgetfulness on an important point); 65 Ohio St. 414 (injurious incompetency). Occupation in a competing employment, &c., injurious to the master's interest, justifies a discharge. *Dieringer v. Meyer*, 42 Wis. 311; 35 Md. 47.

If good ground of discharge exists and is known to the master at the time of dismissal, it is sufficient to justify the discharge, although he choose to allege some other cause. § 463; 4 Bing. N. C. 638; 3 Ad. & El. 171; 5 Q. B. 447. And see 138 Ala. 608 (justification by a cause not known when the discharge took place); 163 N. Y. 351; 80 N. Y. S. 691. The master is always bound to consider justly the circumstances. 51 N. J. L. 133. Discharge for a certain cause should be reasonably soon (though not necessarily at once) after knowledge of the cause in order to avail the employer. *Williams v. Jeter*, 64 Ga. 737; *Bast v. Byrne*, 51 Wis. 531; 118 Ga. 868. And a waiver of the right to discharge or a condonation of the offence may be presumed from circumstances. 77 Mo. App. 572; *Prentiss v. Ledyard*, 28 Wis. 131.

It need hardly be added that to discharge a servant peremptorily from one's employ without justifiable cause, before the term of employment ends or is presumed to end, subjects the master to a suit in damages. §§ 464, 472. And the servant, though less frequently sued for his breach of contract because less apt to be pecuniarily responsible, is legally liable in damages for his own breach where, without good excuse, he leaves his service prematurely or fails to comply with the terms of his engagement. §§ 477, 478.

of either party, or by the completion of the term of service.<sup>1</sup> The parties, furthermore, may make new or special terms, as, for instance, in fixing a certain period or in requiring a certain previous notice to terminate; and such terms, even if more favorable to one than the other, must, if not against public policy, be mutually respected.<sup>2</sup>

467. A servant's occupation of premises belonging to his master is not presumed to be as tenant, but by virtue of the relation of service. If properly dismissed from the service, therefore, the termination of his service is likewise the termination of his right to the premises.<sup>3</sup>

<sup>1</sup> § 464; 1 Ad. & El. 685; *Stockley v. Goodwin*, 78 Ill. 127; 81 Ill. 468. But leaving in offence because justly reprimanded, is insufficient. 75 Ga. 466. And see § 478 a.

<sup>2</sup> See *Creen v. Wright*, 1 C. P. D. 591; *Walsh v. Walley*, L. R. 9 Q. B. 367; 119 Mass. 400; 118 Mass. 817; 181 Mass. 360; 112 Wis. 271; 78 Me. 571. Such contracts are not common in domestic service, and they must be fairly interpreted. 36 La. An. 517; 43 Tex. 481; 28 La. An. 822; 51 Wis. 531; 4 Mich. 286. Where the term has expired, proof bearing upon a new arrangement for continuance is admissible, to repel the presumption which silence raises, that the terms were as before. § 464; 98 N. W. 511; 98 N. W. 102; 60 N. Y. 106; 41 Mich. 191.

<sup>3</sup> *White v. Bayley*, 10 C. B. n. s. 227. No right to ejectment upon notice. § 465. Domestic may be employed who live outside the premises, or in their own homes. 17 Pa. Super. 412.

## CHAPTER II.

### MUTUAL OBLIGATIONS OF MASTER AND SERVANT.

**468.** Some obligations arising from the relation of domestic service rest more especially upon the master; others again more especially upon the servant.<sup>1</sup>

**469.** (1) As to the master, a moral obligation resting upon him is to exert a good influence, to regard the servant's mental and spiritual well-being. Positive law enjoins the same duty in a variety of instances with regard to minor apprentices and workmen; but as to adult servants at the present day there is scanty provision.<sup>2</sup>

**470.** As to furnishing necessities, the better opinion is that the master is not bound to provide even a menial servant with medical attendance and medicines during sickness at his own cost.<sup>3</sup> The duty of a master to provide food and other necessities rests upon contract, express or implied; but board, lodging, and wages are the usual incidents of menial service.<sup>4</sup>

**471.** How far the master is bound to find work for his servant has sometimes been considered in the courts. The legal principle is that of substantial justice under their contract.<sup>5</sup>

<sup>1</sup> § 468.

<sup>2</sup> Cf. old books as to master's right of chastisement, &c., which is now usually denied. The master must rather rely upon a right of action against his adult servant for breach of contract or expel him. § 467; 16 Lea (Tenn.), 508 (moderate force forbidden); 1 Ashm. (Penn.) 267.

<sup>3</sup> § 468; 2 Kent, Com. 261; 3 B. & P. 247; Sweetwater Co. v. Glover, 29 Ga. 399; 85 Ill. App. 623; 7 Vt. 76. This holds especially true of adult servants capable of providing for themselves. But as to minors and the helpless and suffering, cf. 8 C. & P. 153; 4 C. & P. 80, 581; 3 Esp. 98.

<sup>4</sup> § 468.

<sup>5</sup> § 469. A master may hire a servant for a certain period, and, pay-

472. Every master should indemnify his servant from the consequences of lawful acts, done in pursuance of orders which the servant was bound to obey.<sup>1</sup>

473. The master must receive into his service a person already engaged; and if he fails to do so, he is liable in damages. And yet here a legally binding contract would have to be shown by the plaintiff.<sup>2</sup>

474. The servant's right to compensation follows from the fact that the parties have fairly entered into the relation of employer and employed with the reciprocal rights and duties of that relation;<sup>3</sup> and it should be presumed, where no *quasi* parental relation existed, that such labor was to be in some way remunerated, and this most naturally by money wages.<sup>4</sup> The question whether the person who sues for his wages did his duty, or, if discharged, was discharged without fault, is for the jury to decide upon all the facts.<sup>5</sup>

ing the wages or salary agreed upon, may keep him in sufficient work or not; but he cannot deprive the servant of his full compensation through a discontinuance of his own requirements, or from other like cause. 5 Q. B. 671; *Elderton v. Emmens*, 6 C. B. 160; 139 Cal. 78.

<sup>1</sup> § 470. See *ib.*, as to wages stipulated in proportion to the work found. As to an act not *malum in se*, but which might have been either lawful or unlawful, and which the servant was induced by the conduct of his master to believe to be lawful, the rule of indemnity likewise applies. 5 Q. B. 830; *Rawlings v. Bell*, 1 C. B. 951; *Cro. Jac.* 468; *Story, Agency*, § 339. Otherwise for an act *malum in se*, or which the servant knew to be unlawful; for the servant should have refused obedience; the master's positive liability in such a case is rather as instigator, to the aggrieved third person. See *post*, cs. 3, 4; §§ 490, 491; 65 S. C. 332.

<sup>2</sup> 1 B. & Ald. 722; 6 Bing. 614; 62 N. Y. S. 753; § 471. Chancery disinclines to compel specific performance. 20 L. J. N. s. 408; 29 Beav. 44. The modern remedy is at law for breach of the contract of hiring. *Howard v. Daly*, 61 N. Y. 362.

<sup>3</sup> § 472; *McDonald v. Boeing*, 43 Mich. 394.

<sup>4</sup> *Moreland v. Davidson*, 71 Penn. St. 371; *Hay v. Walker*, 65 Mo. 17; *Jordan v. Foxworth*, 48 Miss. 607.

<sup>5</sup> *Echols v. Fleming*, 58 Ga. 156.

Where the servant has been wrongfully discharged from his master's employ, two remedies, both at common law, are open to him: (1) to treat the contract as a continuing one, and sue in damages for breach thereof; (2) to consider it as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered. *Lilley v. Elwin*, 11

475. Wages are due in general for work performed; and although the amount of wages was left to the master, a reasonable remuneration must be given.<sup>1</sup>

Q. B. 755; 8 Bing. 14; 31 Barb. (N. Y.) 381. Formerly it was thought that he might (3) wait till the end of the period of service, and then sue for his whole wages in *assumpsit*, relying on the doctrine of constructive service. *Gandall v. Pontigny*, 1 Stark. 157; *Collins v. Price*, 5 Bing. 132; 2 Smith, Lead. Cas. 17, n. to *Cutter v. Powell*; *James v. Allen Co.*, 44 Ohio St. 226. But this course cannot now be adopted; for the discharged servant, though wrongfully dismissed before the agreed expiration of the term, is bound to make the best use of his time and seek out some new employment to reduce damages. § 473; *Beckham v. Drake*, 2 H. L. Cas. 606; *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; 15 Q. B. 576; *Chamberlin v. Morgan*, 68 Penn. St. 168; *Perry v. Simpson, & Co.*, 37 Conn. 520; *Howard v. Daly*, 61 N. Y. 362; *Bennett v. Morton*, 46 Minn. 118. Cf. 44 Ohio St. 226. So in breach of contract to receive. 61 N. Y. 362, 473. While the servant may elect either of the two remedies, he cannot pursue them together; and if he sues on both counts in his action he must take the verdict upon one only. 15 Q. B. 576; 31 Barb. (N. Y.) 381.

In (1) the servant can recover wages for the whole term, less what he had an opportunity to make by like service after his dismissal, and it is damages rather than strict wages that he recovers. See 39 Ark. 280; 68 Ga. 169; 184 Mass. 337. The amount of damages recoverable depends upon the nature of the contract and the wages customary or agreed

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<sup>1</sup> § 473; 5 M. & W. 114; 2 Camp. 45; 48 Wis. 643. But see 1 M. & S. 290; 15 Q. B. 576; 28 Minn. 205 (master's rate held conclusive). But one might have agreed to serve for his board, lodging, clothes, &c. So where employer was to be the sole judge as to the good and satisfactory nature of the work done for him, he must judge honestly and not capriciously or wantonly. 56 N. Y. S. 624.

The master is not bound to pay increased wages for voluntary increased labor, unless he has contracted to do so. *Peake*, 45; 56 Wis. 671. Cf. 7 Ind. 595. One who has received for his services all that was *bona fide* agreed upon, can recover no more, although the services may have been worth more. *Bradbury v. Helms*, 92 Ill. 35. See *Smith v. Velie*, 60 N. Y. 106 (statute of limitations); 61 Kan. 533.

The master cannot set off, against the servant's claim for wages, a gratuity or present to the servant outside the contract of employment. *Neal v. Gilmore*, 79 Penn. St. 421. Perquisites may have entered into the contract of hiring by way of lessening the wages. *Bennett v. Stacy*, 48 Vt. 163. See as to offset of articles lost or broken, 4 Camp. 134. And see 100 N. Y. 115 (small sums retained by servant). In modern practice the right to recoup in suits is favored.

**476. Death ends the present relation.** Here act of God intervenes, and whether the death be that of master or servant, the rule in all contracts where the service may be deemed purely personal, as it is in household employment, should be that the contract relationship is dissolved, leaving the survivor free to engage or serve elsewhere.<sup>1</sup> Where the performance

upon. See *Beckham v. Drake*, 2 H. L. Cas. 606; 8 C. B. 44; 15 Md. 502; 22 Tex. 550; *Sherman v. Champlain Trans. Co.*, 31 Vt. 162. In case of unwarrantable discharge, the servant's damages are *prima facie* the amount of remaining wages for the full term. 45 N. Y. Super. 610; 126 Penn. St. 171. But if employed meantime in a new place, this reduces the damages, so far as may be reasonable. *Ansley v. Jordan*, 61 Ga. 482. See 64 Ga. 684; 51 Wis. 531; 43 Mich. 476. The burden of proof is on the defendant master, to show that by reasonable efforts the plaintiff might have obtained similar employment elsewhere. *Emery v. Steckel*, 126 Penn. St. 171. Like service is the standard in estimating opportunities, for such servant is not bound to accept employment substantially different or inferior, in reduction of damages. *Hinchliffe v. Koontz*, 121 Ind. 422. The jury may exercise a large discretion; and, where no specific wages have been agreed upon, the measure is fixed by considering what is the usual rate of wages for the employment contracted for, and what time would be reasonably lost before another situation could be obtained.

(2) treats the contract of service and hiring as rescinded; and the ground on which the servant sues is, that when one party to a contract has absolutely refused to perform something essential on his side of the contract, the other party is at liberty to terminate it, and sue for services rendered under a *quantum meruit*. § 473 (applicable to contracts in general); 15 Q. B. 576. Where this remedy is elected the servant can only recover wages, fixed or customary, for the period during which he actually served. 1 Exch. 295; *Weed v. Burt*, 78 N. Y. 191; *Boyle v. Parker*, 46 Vt. 343; *Ralston v. Kohl*, 30 Ohio St. 92; *Dobbins v. Higgins*, 78 Ill. 440; *Barr v. Van Duyn*, 45 Iowa, 228. But cf. 28 La. An. 595. And see, as to father of minor, 71 N. C. 372. See 99 Penn. St. 552 (lapse of time).

Where a servant is unjustly discharged, while the master may reduce the damage by showing that the servant obtained, or could obtain, other employment, he cannot defeat his right of action. *Wilkinson v. Black*, 80 Ala. 329; 7 Col. 562. Refusal to continue employment at reduced wages does not prejudice the discharged servant's suit. 77 Ala. 387.

<sup>1</sup> *Lacy v. Getman*, 119 N. Y. 109; 19 Pa. Super. 508. Skilled or unskilled labor must follow this rule. But cf. 127 N. C. 2 (employment to make a crop). As to apportioned wages, in such a case, see 13 Q. B. 422; § 473 a. The executor or administrator of the master may be sought for

of a condition is prevented by the act of God, it is excused. And where one performs services under a personal contract, and is, before the expiration of the full period, disabled by sickness or inevitable accident from completing his contract, he is entitled to recover as upon a *quantum meruit* for the period of such disability.<sup>1</sup>

477. Where a service terminates by mutual consent, recovery may be had on a *quantum meruit* for the services actually performed, even if not satisfactory under the contract; though for nothing more, unless expressly agreed to.<sup>2</sup>

such arrears. In some States wages of domestic servants and laborers are made preferred debts. Legacies, if actually bequeathed to servants, may or may not extinguish all claim against the master's estate for wages. When a servant keeps on in the same family after the master's or hirer's death, it can only safely be by some new contract of service with the widow or some other responsible head or representative of the household, for though the original contract were for a longer time, the contract when purely personal is ended. § 473 a. See 31 Mich. 247; 17 N. Y. Supr. 311, 322; 52 Ind. 842. See further as to apportionment of wages, *ib.*; 2 Smith, Lead. Cas. 17 n. to *Cutter v. Powell*, 6 T. R. 320.

On legal principle, moreover, when a servant dies in the midst of the term of his engagement, his representatives can, it seems, claim nothing; but here again might custom apply the rule of apportionment, as local codes sometimes do. And on the other hand the relation of service being a personal one, the master has, on the servant's death, no legal indemnity not specially stipulated, though engaging for a definite time. 57 Ala. 551; § 473 a.

<sup>1</sup> *Wolfe v. Howes*, 29 N. Y. 197; *Cuckson v. Stones*, 1 El. & El. 248; 11 Vt. 557; *Seaver v. Morse*, 20 Vt. 620. Yet where illness or other cause renders one permanently incompetent to perform his contract, this is a sufficient cause of termination on one side or the other, at discretion. *Id.*; 5 C. B. n. s. 236; *O'Connor v. Briggs*, 182 Mass. 387; 36 La. An. 201; § 474. Special contract or custom might affect such a point. So, too, if one engages in service, concealing a disability which must have interfered with due performance, he may be made to bear the ill consequences. *Jennings v. Lyons*, 39 Wis. 553.

<sup>2</sup> § 475; *Given v. Charron*, 15 Md. 502; 41 Vt. 66; *Boyle v. Parker*, 46 Vt. 343. As to agreements providing that either party may terminate at any time, see 7 Wis. 404; 4 Denio (N. Y.), 121. But, in general, if employed for a fixed period and discharged without cause or improperly, the servant should be compensated for the full unexpired term, as already noted. 68 Ill. 123, 474. Forfeiture of wages in such contracts is not to be favored; but reasonable conditions plainly expressed, are upheld. *Walsh*



478. Testimonials of character are sometimes given. But in the absence of any specific agreement to that effect or clear and positive custom there is no legal obligation binding a person, who has retained another as a servant, to give that person any character at all on severance of service; and no action will lie against him for refusing to do so. And the decisions on this subject fully establish the principle that representations of a servant's character, oral or written, are on the footing of privileged communications.<sup>1</sup>

479. (2) Some obligations rest more especially upon the servant in our present relation. Thus the servant, once engaged by a valid contract to enter his employer's service, cannot refuse or neglect to enter without becoming liable in damages; though whether the master may care to pursue his remedy is another matter.<sup>2</sup> The same may be said of one who without sufficient cause leaves his employment before the legal termination of the period agreed upon.<sup>3</sup> While per-

*v. Walley*, L. R. 9 Q. B. 367; 119 Mass. 400. As to payment on work for land, &c., see 13 Gray (Mass.), 3; 28 Ga. 247; *Wright v. Haskell*, 45 Me. 489.

As to changes of the contract of hire (inferable from the circumstances), see *Edrington v. Leach*, 34 Tex. 285; *Smith v. Velie*, 60 N. Y. 106 (presumption of continuance as before overcome); *Spicer v. Earl*, 41 Mich. 191 (notice of change and a silent continuance). And see 98 Wis. 376.

<sup>1</sup> § 476; 3 Esp. 201; 174 Ill. 398; 65 Ohio St. 414. Wilful misrepresentation must appear on the master's part to render him liable; not merely wrong and unfair statements made in good faith and without malicious intent. *Smith*, 223-250; 3 Q. B. 12; 1 B. & Ald. 240. And see, as to compelling inspection of letter written concerning a discharged servant, *Hill v. Campbell*, L. R. 10 C. P. 222. Concerning another's guaranty for the honesty of one's servant, see L. R. 7 Q. B. 666.

<sup>2</sup> § 477; 2 Man. & Gr. 574; *Smith, Mast. & Serv.* 64. In cases of hiring analogous to domestic service, injunction has sometimes been considered. Such process would not be favored, however, to compel a reluctant cook, butler, or housemaid, to keep an engagement to serve; nor in any case, perhaps, where it is not very difficult to engage some one else for the vacancy. Remedies at common law for damages should indemnify more appropriately. But see 58 Conn. 356; 57 Hun (N. Y.), 587.

<sup>3</sup> *Bird v. Randall*, 3 Burr. 1345; 5 Bing. 34. That the service is unpleasant or the labor severe would not alone justify his departure. *Angle*

forming service under his contract the servant is bound to regard the interests of his master.<sup>1</sup>

**480.** So is the servant liable for negligence in the care of his master's property intrusted to him, and, generally, as it would appear, for want of ordinary care and diligence in such service; though not for ordinary accidents where no culpable negligence appears.<sup>2</sup> Servants are liable to their respective masters for fraud and misfeasance, as in cases of simple bailment generally.<sup>3</sup>

*v. Hanna*, 22 Ill. 429. But if the master's unprovoked assault causes the servant to fear injury, the latter may properly leave. *Bishop v. Ranney*, 59 Vt. 316.

<sup>1</sup> § 477; 2 Esp. 732; 35 Md. 47. He must account to his employer, like all other agents, for money or other goods received in the line of duty, and he cannot volunteer to set up the right of a third party in opposition to the employer's interests. § 477; *Story, Agency*, § 217 and *n.*; 2 B. & Ald. 310; 2 Exch. 538; *Cheesman v. Exall*, 6 Exch. 341. He should devote his time and energy to his master's interests as those ordinarily diligent in his pursuit are wont to do under the circumstances. The maxim that one cannot serve two rival masters has especial force when applied to domestic service. §§ 477, 498; 118 Ga. 868; 189 Ill. 200 (working on Sunday).

<sup>2</sup> 11 Mod. 135; *Bac. Abr. tit. Master and Servant (M)*.

<sup>3</sup> § 478; *Schoul. Bailm. Part I.* Suits of this sort, strictly applicable to domestic servants, are extremely rare; but there are instances to be found in the old books. For servant's liability in a suit brought by his master to indemnify from the consequences of negligence or misconduct, see 4 T. R. 589; 6 Man. & Gr. 165; 20 Wis. 408. As to work requiring skill, see *Willard v. Pinard*, 44 Vt. 34; 2 C. B. N. s. 790; 8 Iowa, 106; 34 Ala. 201; *Parker v. Platt*, 74 Ill. 430; *Page v. Wells*, 37 Mich. 415. Cf. 31 Vt. 639 (infant servant).

## CHAPTER III.

### GENERAL RIGHTS AND LIABILITIES OF THE SERVANT.

**481.** Servants are not usually liable personally to third persons on contracts entered into by them on behalf of their masters. Such a principle would be inconsistent with the very relation; though, like any other agent, a servant may make himself liable, provided he contract on his own and not his master's behalf, or where he acts outside of his authority.<sup>1</sup>

**482.** But where the contract is corrupt, oppressive, or immoral which the servant performs it is otherwise.<sup>2</sup> In cases of tort, the rule is general that all persons concerned in the wrong are chargeable as principals. For a misfeasance, therefore, or positive wrong, which affects the person or property of another, the servant cannot shield himself by the excuse that he acted merely in obedience to his master's orders, or for his master's benefit.<sup>3</sup>

<sup>1</sup> § 481; Story, Agency, § 261; 2 Esp. 567; 9 B. & C. 88. Questions of this sort turn upon circumstances; as to whom, for instance, the credit was given. But if there be a wrong or omission of right on the servant's part; if, for instance, he transcends his powers, or acts without authority, he becomes like all other agents personally liable to the person with whom he deals in his master's name. 10 M. & W. 1; 15 East, 62; s. c. 2 Smith, Lead. Cas. 358. The receipt of a servant is the receipt of his master, for money rightfully paid him in the course of business. 11 Ad. & El. 926.

The reason of this general rule of exemption is that the principal or master, not the agent or servant, shall answer for the consequence of the latter's contract. The servant is directly responsible to his master and consequently not to strangers. § 481.

<sup>2</sup> § 482; 3 Esp. 232; Smith, Mast. & Serv. 204. See Cowp. 565; 4 Man. & Gr. 389; 5 B. & Ad. 504; Lewis v. Sawyer, 44 Me. 332.

<sup>3</sup> § 482; Lane v. Cotton, 12 Mod. 488; Smith, Mast. & Serv. 213, 214; Richardson v. Kimball, 28 Me. 463; Bennett v. Ives, 30 Conn. 329; Hoffman v. Gordon, 15 Ohio St. 211. Cf. Wilson v. McLaughlin, 107 Mass.

**483.** The servant is criminally accountable for his unlawful acts knowingly committed in his master's service.<sup>1</sup> And a hired hand who abets his employer in a crime with knowledge of the latter's guilty intent is himself accountable.<sup>2</sup>

587. Such distinctions run through the whole law of service or agency in its broadest relation, and are constantly discussed outside the narrow range of domestic service. Perhaps the true principle is to refer all such acts of the servant to the scope of his employment in the particular service of his master. Master and servant are jointly and severally liable for the tort of a servant committed within the scope of his employment. Next chapter; 205 Penn. St. 258; 65 S. C. 332; 103 Ill. App. 554; 66 N. E. 379. But not when the servant was innocent of wrong. *Silver v. Martin*, 59 N. H. 580. As a master is more likely to be pecuniarily responsible than his servant, so do those who would sue for injuries incline rather to make the master the defendant in their suits to recover damages.

<sup>1</sup> *State v. Walker*, 16 Me. 241.

<sup>2</sup> § 484.

As to the right of master and servant to defend one another, or to testify for one another, see §§ 479, 480. For servant's suit against one who falsely and maliciously interfered to cause his discharge, see *Moran v. Dunphy*, 177 Mass. 485. And as to assault upon servant by the master, see 90 Minn. 327.

## CHAPTER IV.

### GENERAL RIGHTS AND LIABILITIES OF THE MASTER.

484. In this chapter we shall discuss (1) the general rights, (2) the general liabilities, of the master as concerns third persons and his servant.

485. (1) The right of action for personal injuries sustained by one's servant is recognized in several instances.<sup>1</sup>

486. Again, the action for seduction depends upon the relationship of master and servant; and the loss of service gives the right of action.<sup>2</sup> For enticing away or harboring one's servant the common law also gives a right of action against the offending party.<sup>3</sup>

<sup>1</sup> 4 B. & C. 660; 11 Ad. & El. 801; *Dixon v. Bell*, 1 Stark. 287; *Ames v. Union Co.*, 117 Mass. 541. This right grows out of the loss of service sustained by the master, and the same principle has been noticed with reference to parents. A service *de facto* is sufficient in all such cases. § 486; *Smith, Mast. & Serv.* 83-85. But, under a familiar rule, the master cannot maintain an action for injuries which cause the immediate death of his servant. *Osborn v. Gillett*, L. R. 8 Ex. 88.

<sup>2</sup> This action is usually brought by the parent, or one standing in the stead of a parent; though the legal remedy is not perhaps confined to such persons. See § 487; *ante*, 274; *Noice v. Brown*, 39 N. J. L. 569; *Smith, Mast. & Serv.* 85 *et seq.*

<sup>3</sup> § 487; *Smith, Mast. & Serv.* 79; 6 T. R. 221; 3 Burr. 1352. One who did not entice may yet upon notice disregarded be liable for harboring. See *Lumley v. Gye*, 2 Ell. & Bl. 216. But laches may be imputable to the master. 6 Wend. (N. Y.) 436. Local statutes aid the doctrine of the text. 11 Lea (Tenn.), 259, 271. As to attempt to entice with no damage, cf. 3 Burr. 1352; *Haskins v. Royster*, 70 N. C. 601. No action for inducing to leave when time expires. 2 Esp. 734; 4 Pick. (Mass.) 425. See 63 N. J. Eq. 443. For causing his servant to leave him by threats, a master may also sue. 33 La. An. 1261.

A genuine subsisting contract of service (binding if executory) between the servant and his former master should, of course, be shown. 9 Ad. & El. 693; 34 N. H. 49; *Walker v. Cronin*, 107 Mass. 555. See

487. What a servant may acquire during the relation of service, entirely without the legitimate consideration of such service, does not belong to the master. And one may, moreover, stipulate that outside certain hours he shall have his own time.<sup>1</sup> But the master shall have the advantage of his servant's contracts as to matters within the scope of the service.<sup>2</sup>

488. (2) A master is liable for the contract of his servant, made in the course of his employment about his master's business.<sup>3</sup>

489. The master's civil liability for servant's torts, whether to third parties or to the servant himself, receives at the present day more attention in the courts than any other topic of the so-called law of master and servant; perhaps more than all the other topics together. The universal rule is that whether the act of the servant be of omission or commission, whether his negligence, fraud, deceit, or perhaps even wilful misconduct, occasion the injury, so long as it be done in the course and scope of his employment, his master is responsible in damages to third persons injured thereby.<sup>4</sup>

also *Noice v. Brown*, 39 N. J. L. 569; *Salter v. Howard*, 43 Ga. 601; *Burgess v. Carpenter*, 2 S. C. n. s. 7. A *scienter* should generally appear; and for malicious enticement the damages are the greater. 56 N. H. 456; 77 N. C. 37; 47 Ga. 311. Criminal prosecutions are allowed in some States. 114 Ga. 34.

<sup>1</sup> *Wallace v. De Young*, 98 Ill. 638.

<sup>2</sup> § 488; *Damon v. Osborn*, 1 Pick. (Mass.) 481; 49 N. J. Ch. 92; *Hamaker v. Blanchard*, 90 Penn. St. 377 (finder). Cf. 86 Mo. 27; *Lister v. Stubbs*, 45 Ch. D. 1.

<sup>3</sup> The power which a servant possesses of binding his master by contracts is founded upon, or rather is the basis of, the general law of principal and agent. *Smith, Mast. & Serv.* 122. For, in truth, it would seem that the relation of master and servant is the older at the law. § 489. See *Co. Litt.* 52 a; *Story, Agency*, §§ 7, 8, 74, 75; *Bird v. Brown*, 4 Ex. 798; 5 Esp. 72; 3 Dev. (N. C.) 244. The scope of authority may be expressly conferred or implied; secret limitations cannot affect third persons unaware of them; and subsequent ratification binds as well as a previous authority. But the illustrations utterly transcend the relation of domestic service, being borrowed in great part from the analogies of modern business corporations and servants in such employ.

<sup>4</sup> § 490; *ante*, 482; *Story, Agency*, § 452; *Smith, Mast. & Serv.* 151,

490. A master is not in general responsible to his own servant for any injury which the latter may sustain through the negligence or wrongful act of a fellow-servant, unless the master has been negligent in his selection or retention of the servant at fault. The converse of this rule holds good.<sup>1</sup>

152. And it makes no difference that the master did not give special orders; that he did not authorize, or even know, of the servant's act or neglect. Whether an act amounts to negligence, misfeasance, and the like is to be determined in each case by its own circumstances. The injury occasioned may be to person or property. § 490 and cases cited. Among the many instances which have been considered as falling within the rule are these: Negligent driving by a servant. Cf. *Hohnes v. Mather*, L. R. 10 Ex. 261. The negligent kindling of a fire. 11 Q. B. 347. Piling up wood improperly. 6 Cow. (N. Y.) 189. Mismanagement of a boat, whereby another is injured. 7 B. & S. 137; 2 Cr. M. & R. 432. Negligence in leaving a cellar hole open. 76 Me. 100. Unskilful workmanship. 55 Barb. (N. Y.) 239. As to injury by the master's ferocious dog in charge of the servant, see L. R. 7 Ex. 325. Reckless driving by coachman. 67 Wis. 495; 4 B. & Ald. 590; L. R. 10 Ex. 261. And it is to be observed that the master's responsibility is not confined to those who work under his immediate supervision, but extends to all others whom he selects to do any work or superintend any business for him. See 14 East, 605.

Where the injury was the combined carelessness of master and servant, the master ought the more to be held liable. *Tuel v. Weston*, 47 Vt. 634. Cf. 56 N. Y. 44; 114 Mass. 518.

But a master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, and does not happen in the course or the scope of their employment. Beyond the scope of his authority, the servant is as much a stranger as any other person. § 491; 2 N. H. 548; 28 Ill. 434; 8 Ad. & El. 512; 9 C. & P. 629; 26 Fed. (U. S.) 912; *Way v. Powers*, 57 Vt. 135 (driving on servant's own or an unpermitted business); 175 N. Y. 495; *Storey v. Ashton*, L. R. 4 Q. B. 476; 2 C. P. D. 357; 19 N. Y. Supr. 465; *Stone v. Hills*, 45 Conn. 44. See as to malicious assault and battery by a servant, 140 Mass. 327. Or a servant's cruelty to an animal without the presence, order, or direction of the master. 47 N. J. L. 237. Cf. 54 Mich. 73. And see (1891) 1 Q. B. 516 (false arrest); 178 Mass. 108 (flogging). The distinction in such cases is not always clear; but we should hardly expect to see the rule of *respondeat superior* applied where a wrong is done wholly for one's own purpose and in his own concerns, disconnected from the employment of the master in question, especially if wilfully and maliciously. § 491.

<sup>1</sup> § 492 and cases cited. The illustrations are mostly outside of mere domestic service. *Smith, Mast. & Serv.* 187.

Ordinary and reasonable care and diligence on his part will protect the master from liability to his own servants; and ordinary care is usually presumed to exist. But for his own culpable negligence or tort a master is liable to his own servant as to any one else; that is to say, provided the servant on his part exercised ordinary care.<sup>1</sup>

491. The master is not criminally liable for the acts of his servants, unless he expressly command or personally co-operate in them. Each offender against public justice must answer for himself.<sup>2</sup>

<sup>1</sup> § 492 and cases cited.

It is incumbent upon the master to use ordinary and reasonable care in selection of servants, and in the procurement of materials, and in keeping the premises of usual employment in repair and safe condition, and in remedying defects which are brought to his notice. But a master does not insure his servant against accidents, nor as against the servant's own risks or carelessness. In domestic or household service, where the risk of personal injury is small, the master should not be held very rigidly accountable for primitive implements used about the house; especially as there are certain risks of all employment, which the servant who can appreciate them is supposed to take upon himself. § 492; 123 U. S. 710; 100 U. S. 213; 55 Ill. 284; 155 Mass. 513; 178 Mass. 485 (safe appliances within reach).

<sup>2</sup> § 493; Smith, Mast. & Serv. 143; 8 Ind. 312; 2 Gray (Mass.), 181. But as to a penal law, &c., cf. the local statute.





# INDEX.

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[REFERENCES ARE TO PARAGRAPH NUMBERS.]

---

## A.

**ABANDONMENT** of wife, 229.

**ACCOUNTS** of guardian, 387-390.

### **ACTION**

- (1) *Husband and Wife*:
  - desertion, etc., 38.
  - enticement, alienation of affections, etc., 43, 44.
  - cruelty, 47, 48.
  - mutual suit, contract or tort, 51-54.
  - criminal liability, 52.
  - wife's suit, when separated, 59.
  - in contracts of wife, 57-79.
  - in torts by or upon wife, 81-85.
  - in separate property, 168.
  - of spouse under statutes, 205.
  - separation and divorce, 227, 230.
- (2) *Parent and Child*:
  - tort upon child, 271.
  - abduction, seduction, etc., 273-276.
  - suits of parent and child, 288.
  - illegitimate children, 294.
- (3) *Guardian and Ward*:
  - guardian's, 360.
  - suit on guardian's bond, 392, 393.
  - by ward, 395-398.
- (4) *Infancy*:
  - infant's torts, 437-444.
  - by infant; next friend, etc., 457.
  - against infant; guardian *ad litem*, 458.
  - equity rule similar, 459.
- (5) *Master and Servant*:
  - servant wrongfully discharged, 474.
  - suit against servant, 481, 482.
  - suit by master, 485, 486.
  - suit against master, 489, 490.

[References are to paragraph numbers.]

ADOPTION of child, 243.

AFFINITY, 16.

AGENCY

of wife, 64-78, 223, 464.

of husband, 162-165, 178.

of child, 252, 252 a.

ALIEN, 41.

ANTICIPATION, clause against, 122.

B.

BASTARD, 289-296.

BOND of guardian, 381-384.

C.

CAPACITY, mental or physical, 18, 19.

CHASTISEMENT, 47, 256.

CHOSSES of wife, 92.

COMMUNITY system, 7.

CONSANGUINITY, 16.

CRIMES, 51, 52, 410, 411, 483, 491.

CURTESY, 127, 212, 213.

CUSTODY of children, 50, 257-263.

D.

DEATH,

wife as executrix, etc., 95.

of wife, as to land, 96, 98.

as to separate property, 119.

*of wife*: husband administers, 207, 208.

his distributive rights, 209, 211.

his duty of burial, etc., 210.

real estate rights; curtesy, etc., 212, 213 a.

wills of married women, 214.

*of husband*: administration, 215.

distribution; widow's share, 216.

waiver of will; allowance, 217, 218.

paraphernalia; exoneration, 219, 220.

claims against estate, 221.

obligation to bury; agency, 222, 223.

[References are to paragraph numbers.]

**DEATH** — *continued.*

dower and homestead, 224, 225.

simultaneous deaths, 226.

*of child*: funeral expenses, 254.

in guardianship, 329-331.

*of master or servant*, 466, 476.

**DEBTS**, antenuptial, 61-76, 79.

**DIVORCE**,

in general, 21, 22, 46.

causes and policy, 230, 231 *a.*

bed and board, or absolute, 231.

effect of divorce, 233, 234.

children born after, 239.

custody of children, 261.

**DOMESTIC RELATIONS**,

in general, 1-3.

husband and wife; property schemes, 4-7.

recent marital legislation, 8, 9.

other relations, 10.

*See* HUSBAND AND WIFE; PARENT AND CHILD; GUARDIAN AND  
WARD; INFANCY; MASTER AND SERVANT.

**DOMICILE**, 3, 39, 242, 320, 350.

**DOWER**, 224.

**E.**

**EARNINGS**,

of wife, 89, 172.

of child, 265, 280-283, 351.

**EDUCATION**, 246, 253, 352-358.

**EMANCIPATION**,

of child, 280-283.

**ENTIRETY**, 203.

**EXONERATION**, wife's, 220.

**G.**

**GUARDIAN AND WARD**,

preliminary, 1-3, 10, 268.

(1) *In general*: kinds, 297.

English kinds; natural; socage; testamentary; chancery, 298-302.

election by infant, 303.

American kinds; testamentary; chancery and probate, 307, 308.

[References are to paragraph numbers.]

GUARDIAN AND WARD — *continued.*

- civil law ; insane and spendthrift wards, 309, 310.
- special kinds ; guardian *ad litem*, 311, 312, 458, 459.
- (2) *Appointment of guardians*, 313.
  - law or parental appointment, 314–316.
  - election by infant, 317.
  - judicial appointment of chancery and probate guardians, 319–325.
  - civil law rule, 326.
- (3) *Termination of guardianship*, 327.
  - natural ; death or marriage of ward, 329, 330.
  - death, resignation or removal of guardian, 331–334.
  - testamentary guardian superseded, 335.
  - marriage of female guardian, etc., 336, 337.
- (4) *Nature of guardian's office*, 338.
  - person or estate ; trustee in fact, 338, 339.
  - joint guardianship, 340.
  - courts and the estate, 341.
  - guardianship and other trusts, 342.
  - minor guardian ; quasi guardian, 343, 344.
  - local authority ; foreign guardian, 345.
  - constitutional questions, 346.
- (5) *The ward's person*, 347.
  - right of custody, 348.
  - change of ward's domicile, 350.
  - no right to personal services, 351.
  - protection, education, maintenance, 352.
  - schemes of support, etc., 353–358.
- (6) *The ward's property*, 359.
  - right to manage, sue or defend, 359, 360.
  - guardian's general contract, 361.
  - title to choses ; promise to pay, 362.
  - employment of attorneys, etc., 363.
  - conversions of property, 364.
  - acts when protected by court, 365.
  - no hazard of trade, 366.
  - as to ward's real estate, 367, 368.
  - as to ward's personal estate, 369, 370.
  - investments ; interest, 371–373.
- (7) *Sales of ward's real estate*, 374, 375.
  - local statutes ; sale or mortgage, 376–378.
  - chancery authority, etc., 379, 380.
- (8) *Guardian's bond, inventory and accounts*, 381.
  - recognizance or probate bond, 381–384.
  - special bond for sale of land, 385.
  - guardian's inventory, 386.

[References are to paragraph numbers.]

**GUARDIAN AND WARD** — *continued.*

- guardian's accounts, 387-390.
- compensation of guardian, 391.
- suit on probate bond, 392, 393.
- (9) *Rights and liabilities of ward*, 394.
  - suit against guardian, 395-397.
  - recovery of embezzled property, 398, 399.
  - ward's disaffirmance on majority, 400.
  - guardian's unfair advantage, 401-403
  - transactions set aside, 404.
  - marriage of ward of chancery, 405.
  - consent in marriage, 31.

**H.**

**HOMESTEAD**, 225.

**HUSBAND AND WIFE**,

- in general, 1-9.
- marriage. (See **MARRIAGE**.)

*Effect of marriage ; coverture :*

- (1) *Person of spouse ; common-law rule*, 35, 36.
  - home and cohabitation, 37, 38.
  - matrimonial domicile, 39.
  - contract in restraint, 40.
  - alien and citizen, 41.
  - wife takes husband's surname, 42.
  - right of society and companionship, 43.
  - duty to render service or support, 45, 46.
  - chastisement or restraint, 47, 48.
  - regulation of household, 49.
  - mutual suits : crimes, 51, 52.
  - offence against property : contracts, 53, 54.
  - disqualification of witnesses, 55, 56.
- (2) *Wife's debts and contracts*, 57, 58.
  - wife separated ; coverture, 59, 60.
  - wife's antenuptial debts, 61.
  - disability to contract, 62, 63.
  - wife binds as agent, 64, 78.
  - wife's necessities when together or apart, 65-76.
  - reputed marriage, 77.
  - marriage of debtor and creditor, 79.
  - hire of servant, 464.
- (3) *Wife's injuries and frauds*, 80.
  - torts by wife : husband joined, 81, 82.

[References are to paragraph numbers.]

**HUSBAND AND WIFE — *continued.***

torts based upon a contract, 82 a.  
 torts upon wife : husband joined, 88.  
 two causes of action, 84.  
 instantaneous death, 85.  
 actual marriage essential, 86.

- (4) *Wife's personal property*, 87.  
 husband's title; earnings, etc., 88, 89.  
 things corporeal, 90.  
 things incorporeal, 91, 92.  
 husband's reduction to possession, 93.  
 wife's equity, 94.  
 wife's fiduciary property, 95.
- (5) *Wife's chattels real and real estate*, 96.  
 rule as to chattels real, leases, etc., 96, 97.  
 wife's real estate; husband's usufruct, 98, 99.  
 his right to bind, alienate, etc., 100-102.  
 his dissent from her title, 103.  
 his agreement to convey : modern statute, 103-105.  
 rights of wife as surety, etc., 106.  
 deed of infant wife's land, 107.  
 wife's general and separate lands, 108.
- (6) *Modifications by equity and recent statute*, 111-114.
  - (a) *separate property* ; English rule, 115.  
 incidents; equitable rules, 116-120.  
 husband's obligation; restraint upon wife, 122.  
 English recent statutes, 123.
  - (b) *separate property* ; American rule, 124.  
 statutes since 1848, 125.  
 statute doctrines; prospective rule, 126-129.  
 methods of transfer from third parties, 130.  
 acquisitions from husband, 131.  
 husband's control; trustee; presumptions, 132-134.  
 miscellaneous requirements, 135.  
 equitable protection distinguished, 136, 137.
  - (c) *wife's dominion (equitable)*, 138-140.  
 technical rule in real estate, 141.  
 liability for her debts and engagements, 142-144.  
 appointment; bestowal upon husband, 145, 146.  
 trustee's concurrence; her right barred, 147-149.
  - (d) *wife's dominion (statutory)*, 150.  
 liability for debts, etc., necessities, 151-153.  
 surety or guaranty; consideration, 154-156.  
 personal liability; husband's joinder, etc., 157-159.  
 real estate transactions; improvements, 160, 161.

[References are to paragraph numbers.]

**HUSBAND AND WIFE** — *continued.*

- husband as trustee or agent, 162-165.
- married woman as fiduciary, 166, 323.
- latest statutes, 167, 168.
- (e) *pin-money, separate earnings and power to trade*, 169 *et seq.*
  - pin-money, paraphernalia, etc., 169, 170.
  - savings; her earnings, 171, 172.
  - power to trade, 173-177.
  - agencies and partnerships, 178-180.
  - conclusion as to modern legislation, 181.
- (7) *Antenuptial settlements*, 182, 183.
  - distinguished from promise to marry, 183.
  - marriage a consideration, 184, 185.
  - form; marriage articles, 186-189.
  - lost instruments; equity, 190, 191.
  - secret settlement; mistakes corrected, 192-194.
  - rescission or avoidance, 195.
- (8) *Postnuptial settlements, gifts, etc.*, 196.
  - whether upon consideration, 197.
  - as between the spouses, 198-200.
  - whether trustee or conduit, 201.
  - conveyance to husband and wife, 203.
  - resulting trust in property, 204.
  - property suit against spouse, 205.
  - life insurance for spouse's benefit, 206.
- (9) *Death of wife or husband*, 207, 215.  
(See DEATH.)
- (10) *Separation and divorce*, 227-230.  
(See DIVORCE; SEPARATION.)

I.

**INFANCY,**

- in general, 1-3, 10, 107.
- as to marriage, 20, 31.
- (1) *General disabilities of infants*, 406, 407.
  - conflict of laws, 408.
  - right to hold office, 409.
  - responsibility for crime, 410.
  - crimes against infants, 411.
  - right to make will; to testify, 412, 413.
  - marriage settlement, 414.
  - execution of power, 415.
- (2) *Acts void and voidable*, 416.
  - uncertain test; privilege personal, 417, 418.



[References are to paragraph numbers.]

**INFANCY** — *continued*.

rule applied, 419-422.

trading contracts, 423.

effect of distinction, 424.

(3) *Acts binding upon the infant*, 425.

contracts for necessities, 426-430.

as to marriage relation, 431.

not affecting his interest, 432.

infant shareholder, etc., 433.

acts compelled by law or statute, 434, 435.

recognizance or bail, 436.

(4) *Injuries and frauds of infants*, 437.

committed by infant, 438.

contract violations; fraud, 439, 440.

suffered by infant, 441.

parental right of suit; contributory negligence, 442, 443.

compromise or release of claim, 444.

(5) *Ratification and avoidance*, 445, 446.

how constituted, 447, 448.

as to infant's lands, 449-451.

as to executing or continuing contract, etc., 452.

new promise; restoring consideration, 453, 454.

avoidance through agent, 455.

election by chancery, 456.

**INSURANCE, LIFE**, 206, 267.**INVENTORY, guardian's**, 386.**L.****LEASES**, 96, 101.**LEGITIMACY**, 286-241, 289-296.**M.****MAJORITY**, 406.(See **INFANCY**.)**MARRIAGE**,

defined; contract or status, 11, 12.

void and voidable, 18, 14.

essentials stated, 15.

disqualification of blood, 16.

civil condition, race, color, etc., 17.

mental or physical capacity, 18, 19.

infancy; prior marriage, 20-22.

force, fraud or error, 23, 24.

[References are to paragraph numbers.]

**MARRIAGE** — *continued.*

- formal and informal celebration, 25-30.
- consent of parent or guardian, 31.
- defects under statute, 32.
- public policy upholds, etc., 33, 34.
- of infant, 431.
- of ward, 330, 405.
- of female guardian, 336.

**MASTER AND SERVANT,**

in general, 1-3, 10.

- (1) *Nature of relation*, 460.
  - contract of hiring, 461-463.
  - Statute of Frauds applied, 462.
  - hire by husband or wife, 464.
  - termination and causes, 465, 466.
  - servant's occupation of premises, 467.
- (2) *Mutual obligations*, 468.
  - master's duties, 469-473.
  - right of recompense or wages, 474, 475.
  - death, disability or mutual consent, 476, 477.
  - testimonials of character, 478.
  - servant's duties, 479.
  - liable for his negligence, 480.
- (3) *Servant and third persons*, 481.
  - not usually liable on contracts, 481, 482.
  - torts; criminal accountability, 483.
- (4) *Master and third persons*, 484.
  - right of action: enticement, seduction, etc., 485, 486.
  - liability for servant's contract, 488.
  - liability for servant's tort, 489.
  - servants and fellow-servants, 490.
  - criminal accountability, 491.

**MORTGAGES**, 102, 106, 220.

## N.

**NECESSARIES,**

- of wife, 45, 65-77, 153.
- of child, 248, 252, 354, 426-430.
- of servant, 470.

## P.

**PARAPHERNALIA**, 57, 88, 170, 219.**PARENT AND CHILD**: in general, 1-3, 10.

[References are to paragraph numbers.]

**PARENT AND CHILD** — *continued.*

- (1) *Legitimate children in general*, 235.  
     legitimacy defined; presumptions, 236, 237.  
     legitimation, by marriage, etc., 238-241.  
     domicile of child, 242.  
     adoption, 243.  
     consent in marriage, 31.
  - (2) *Duties of parents*, 244.  
     (a) *protection or defence*, 245.  
     (b) *education*, 246.  
     (c) *maintenance in law and chancery*, 247-251.  
         providing a trade or profession, 253.  
         funeral and burial, 254.
  - (3) *Rights of parents*, 255.  
     (a) *chastisement or correction*, 256.  
     (b) *custody, common-law and chancery*, 257-261.  
         child's own wishes, 262.  
         parental contract to transfer, 263.  
     (c) *child's labor and services*, 264-266 a.  
         parental property rights, 267.  
         child's general property his own, 268.  
         effect of legislation, 269.
  - (4) *Child's injuries and frauds*, 270.  
     where child suffers wrong, 271, 272.  
     abduction, seduction, etc., 273-276, 294.  
     where child injures, 277.
  - (5) *Duties and rights of children*, 278, 279.  
     child's emancipation, 280-283.  
     gifts; advancements, 284, 285.  
     quasi parental relation; stepchildren, 286.  
     mutual claims and suits, 287, 288.
  - (6) *Illegitimate children*, 289.  
     bastard's disabilities, 289-291.  
     mother or putative father, 292, 293.  
     suits as to bastards, 294.  
     bequests; guardianship, 295, 296.
- PIN-MONEY**, wife's, 169.

**S.**

**SEPARATION**, 37, 59, 95, 227.  
     reconciliation, 228.

    abandonment of wife, 229.

**SETTLEMENTS; MARRIAGE**,  
     antenuptial, 182-195.

[References are to paragraph numbers.]

**SETTLEMENTS; MARRIAGE—*continued*.**

postnuptial, 196-200.

by infant, 414.

wife's equity, 94.

**STEPCHILDREN.** 286.

**T.**

**TRADE,** 173-180, 366, 423.

**TRUSTEE,**

wife as such, 95, 166.

in separate property, 182, 147, 162, 201.

in gifts of spouses, 202.

in guardianship, 838, 839.

**W.**

**WILL,**

of married woman, 110, 214.

of husband, 217.

appointing guardian, 801, 807, 815, 816, 835, 840.

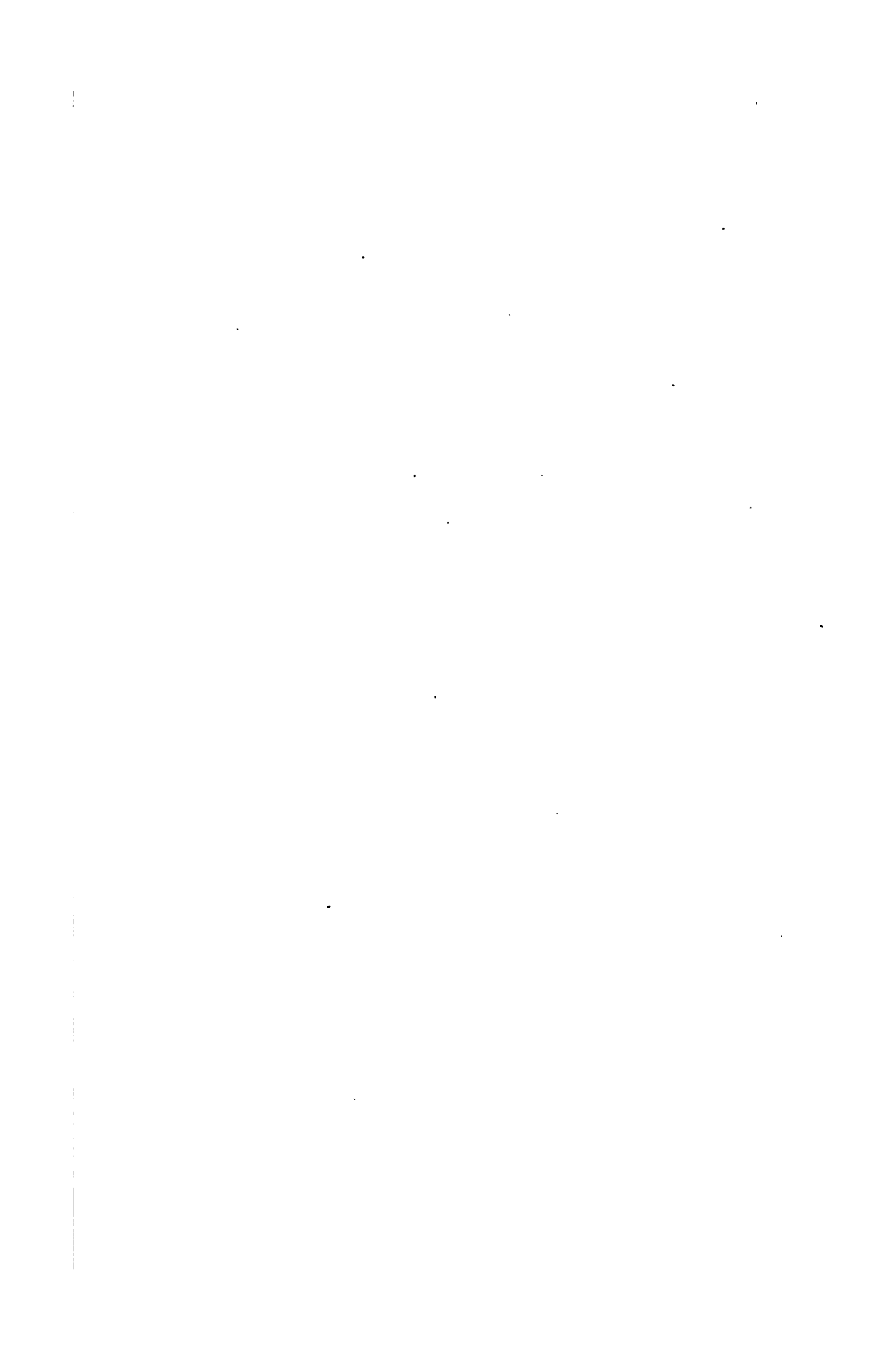
of infant, 412.

**WITNESSES,**

husband and wife, 55.

infant, 413.













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